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Title: Gerald A. Lewis, etc., Appellant
v.
Continental Bank Corporation, et al.

Docketed:
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Court: United States Court of Appeals
for the Eleventh Circuit

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Counsel for appellee: Brown,Bowman

Entry	Date	Note	Proceedings and Orders
1	May 25 1988	G	Statement as to jurisdiction filed.
3	Jun 16 1988		Order extending time to file response to jurisdictional statement until July 27, 1988.
4	Jul 27 1988		DISTRIBUTED. September 26, 1988
5	Jul 27 1988	X	Motion of appellees Continental Illinois Corp., et al. to dismiss or affirm filed.
7	Sep 30 1988		Reply brief of appellant Gerald Lewis filed.
6	Oct 3 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	May 16 1989		REDISTRIBUTED. June 1, 1989
9	May 16 1989	G	Application (A88-904) to file a brief as amicus curiae in excess of page limits, submitted to Justice Kennedy.
10	May 17 1989		Application (A88-904) granted by Justice Kennedy, allowing a maximum of 21 pages.
11	May 18 1989	X	Brief amicus curiae of United States filed.
12	May 25 1989	X	Brief of appellees in response to brief of United States as amicus curiae filed.
13	Jun 5 1989		PROBABLE JURISDICTION NOTED.
			**********
15	Jul 18 1989		Order extending time to file brief of appellant on the merits until August 10, 1989.
16	Aug 9 1989		Brief amici curiae of Natl. Conference of State Legislatures, et al. filed.
17	Aug 10 1989		Joint appendix filed.
18	Aug 10 1989		Brief of appellant Gerald Lewis filed.
19	Aug 10 1989	D	Motion of appellant for divided argument filed.
21	Aug 31 1989		Order extending time to file brief of appellee on the merits until October 3, 1989.
22	Sep 1 1989		Record filed.
		*	Certified copy of original record and proceedings, 6 volumes, received.
23	Sep 25 1989		Motion of appellant for divided argument DENIED.
24	Sep 26 1989		SET FOR ARGUMENT TUESDAY, NOVEMBER 28, 1989. (2ND CASE)
25	Oct 3 1989		Brief amicus curiae of New York Clearing House Assn. filed.
26	Oct 3 1989		Brief amicus curiae of American Trucking Associations, Inc. filed.
27	Oct 3 1989		Brief of appellee Continental Bank Corporation filed.
28	Oct 17 1989		CIRCULATED.
29	Nov 2 1989	X	Reply brief of appellant filed.
30	Nov 28 1989		ARGUED.

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JURISDICTIONAL

STATEMENT

87-1955

Supreme Court, U.S.
FILED
MAY 25 1988

NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by failing to determine this case to be moot, or to remand it to the District Court for such determination, in view of amendments to the federal Bank Holding Company Act, by the Competitive Equality Banking Act of 1987, that prohibit establishment of Appellees' proposed industrial savings bank in Florida.

2. Whether the Court of Appeals erred in depriving Florida of authority over the issuance of corporate charters by invalidating, as violative of the Commerce Clause, Florida's statutory decision to issue no further industrial savings bank charters to any person.

3. Whether claims for violation of the dormant Commerce Clause are cognizable under 42 U.S.C. § 1983, so as to justify the Court of Appeals' award of attorneys' fees on appeal to the Appellees.

PARTIES

Appellant Gerald A. Lewis ("Lewis") is Comptroller of the State of Florida and head of the Department of Banking and Finance of the State of Florida (the "Department"). As head of the Department, Lewis is responsible for regulating state-chartered financial institutions in Florida, including "industrial savings banks" ("ISBs"), which are chartered under Chapter 664, Florida Statutes.

Appellee Continental Illinois Corporation ("Continental Illinois") is a

Delaware corporation with its principal place of business in Chicago, Illinois. Continental Illinois is regulated as a bank holding company pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-50 ("BHC Act").

Appellees William D. Plechaty Richard H. Hanneman, James P. Johnson, Gail M. Melick and Robert F. Fiddes are the proposed organizers of Continental Illinois Savings Bank of Dade County (the "Savings Bank"). It was proposed that Savings Bank would operate in Miami, Florida, as an industrial savings bank pursuant to Chapter 664, Florida Statutes, and would be a wholly-owned subsidiary of Continental Illinois.

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The opinions of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals" or "court below") are reported at 827 F.2d 1517, and 838 F.2d 457, and appear in the Appendix ("App.") at App. 1a - 36a. The orders of the United States District Court for the Northern District of Florida ("District Court") granting summary judgment and ordering final judgment nunc pro tunc, are not reported but appear in the Appendix at App. 37a - 69a.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court rests upon 28 U.S.C. §§ 1254(2) and 2101(c). This is an appeal from a decision of the Court of Appeals which, inter alia, invalidated Section 664.02, Florida Statutes, as repugnant to the Commerce

Clause (Art. I, § 8, cl. 3) of the United States Constitution. The Court of Appeals affirmed a final judgment rendered by the District Court. The original jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343(3). The appellate jurisdiction of the Court of Apppeals was based on 28 U.S.C. §§ 1291 and 1294(1).

The Court of Appeals entered judgment on September 22, 1987, and denied the petition for rehearing of Appellant Lewis on February 26, 1988. Lewis filed a notice of appeal in the Court of Appeals, pursuant to Rule 10 of the Rules of this Court, on May 18, 1988. This appeal was docketed within 90 days from the date of the denial of the petition for rehearing by the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

12 U.S.C. § 1841(c)(1) (as amended by Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987)):

> (1) IN GENERAL. -- Except as provided in paragraph (2), the term "bank" means any of the following:
>
> (A) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act [12 U.S.C. § 1813(h)].
>
> (B) An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which both--
>
> (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and
>
> (ii) is engaged in the business of making commercial loans.

12 U.S.C. § 1813(h):

> (h) The term "insured bank" means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this Act; and the term "noninsured bank" means any bank the deposits of which are not so insured.

12 U.S.C. § 1842(d):

> Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823(f)]) shall be approved under this section which will permit any banking holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect not merely by implication. For the purposes of this section, the State in which the operations of a bank holding

company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1846 (as amended by Pub. L. No. 100-86, § 101(f), 101 Stat. 563 (1987)):

> No provision of this Act shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

* * *

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Fla. Stat. § 664.02:

> (1) The charters of industrial savings banks existing at the time of the adoption of this chapter shall continue in full force and effect, but no new charter may be granted for an industrial savings bank.
>
> (2) All industrial banks shall hereafter be operated in accordance with this chapter.
>
> (3) Notwithstanding the provisions of subsection (1), the department may issue a temporary charter for the sole purpose of facilitating the conversion of a

financial institution into an industrial savings bank, the merger or consolidation of another financial institution with an industrial savings bank, or the acquisition of another financial institution by an industrial savings bank pursuant to the provisions of ss. 655.41-655.419, but the department may not issue a certificate of authorization to transact business under such charter.

STATEMENT OF THE CASE

This case arises out of the Department's denial of an application ("Application") by Continental Illinois and the individual Appellees (hereinafter collectively referred to as "Continental Illinois") to organize and operate, pursuant to Chapter 664, Florida Statutes, a state-chartered industrial savings bank ("ISB") in Miami, Florida. The Application, filed on June 29, 1981, proposed that the Savings Bank would accept negotiable order of withdrawal ("NOW") accounts, savings accounts and certificate of deposit accounts from individuals, and would make home mortgage and consumer loans. The Application stated that "[a]ll deposit relationships will be insured to the maximum extent allowed by

the Federal Deposit Insurance Corporation."[1]

On July 9, 1981, Lewis issued an order rejecting the Application, on the ground that Continental Illinois was precluded from establishing a state-chartered ISB by Fla. Stat. § 658.29(1), as made applicable to ISBs under Fla. Stat. § 664.03(14).[2] Continental Illinois responded by filing, on August 6, 1981, a complaint in the District Court for declaratory and injunctive relief.

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1 Application by Continental Illinois to establish Savings Bank, dated June 29, 1981, at A-28, A-29.

2 Fla. Stat. § 658.29(1) prohibited any bank holding company such as Continental Illinois, whose operations were principally conducted outside of Florida, from acquiring any Florida bank. Section 664.03(14), currently designated as Fla. Stat. § 664.03(3), extended this prohibition on control of banking institutions by out-of-state bank holding companies to include Florida ISBs.

On December 13, 1983, the District Court granted a motion of Continental Illinois for summary judgment and permanent injunction. The District Court held that Fla. Stat. §§ 658.29(1) and 664.03(14) violated the Commerce Clause insofar as the state statutes prohibited an out-of-state bank holding company from acquiring an ISB whose activities would be limited to those in which Savings Bank proposed to engage.[3] During the pendency of motions by both parties to modify that Order, the Florida Legislature amended Fla. Stat. § 664.02, in June of 1984, to provide that no further charters for

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3 Order of the District Court dated Dec. 13, 1983, App. 37a.

ISBs could be approved by the Department.[4] Lewis then filed a suggestion of mootness, on the ground that Fla. Stat. § 664.02, as amended, prevented the Department from acting on the Application.

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4 Fla. Stat. § 664.02(1), as amended by 1984 Fla. Laws, ch. 84-216, § 34, provides:

> The charters of industrial savings banks existing at the time of the adoption of this chapter shall continue in full force and effect, but no new charter may be granted for an industrial savings bank.

Fla. Stat. § 664.02(3) provides that the Department may issue a temporary ISB charter solely for the purpose of facilitating a merger or acquisition, and that no certificate to transact business may be granted in connection with any such charter. Under 1981 Fla. Laws, ch. 81-318 (Florida's Regulatory "Sunset Act"), Section 664.02 and the other provisions of Chapter 664, Florida Statutes, are repealed effective October 1, 1991, and are scheduled for review by the Florida Legislature in advance of that date.

On February 22, 1985, the District Court entered a final judgment nunc pro tunc. In its judgment, the District Court reaffirmed its earlier order of summary judgment and also held that the case had not been rendered moot by the 1984 amendment to Fla. Stat. § 664.02.[5] Following notice of an appeal by Lewis and a cross-appeal by Continental Illinois, Continental Illinois moved for an award of attorneys' fees by the District Court pursuant to 42 U.S.C. § 1988, based on alleged violations of civil rights under 42 U.S.C. § 1983. In the alternative, Continental Illinois asked the District Court to award such fees based on alleged "bad faith" conduct of the litigation by the Department. The

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5 Order dated Feb. 12, 1985, at pp. 4-6, 9-10, App. 56a-60a, 64a-66a.

District Court denied the motion for attorneys' fees without explanation and Continental Illinois appealed.

In the consolidated appeals, the Court of Appeals held, in an opinion issued September 22, 1987, that Fla. Stat. §§ 658.29(1) and 664.03(3) violated the Commerce Clause on their face. Because ISBs could accept only NOW accounts and not demand deposits under Florida law, the Court concluded that ISBs could not be considered "banks" within the meaning of Section 2(c) of the BHC Act, 12 U.S.C. § 1841(c).[6] The Court of Appeals accordingly held that Section 3(d) of the BHC Act, 12 U.S.C. § 1842(d), popularly known as the Douglas Amendment and requiring state statutory authorization for the acquisition of an in-state "bank" by an out-of-state bank holding company, did not authorize Florida to bar the acquisition of ISBs by only out-of-state bank holding companies.[7] The holding of the Court of Appeals with respect to Fla. Stat. §§ 658.29(1) and 664.03(3) is not challenged in this appeal.

The Court of Appeals agreed with Lewis that a valid statutory ban on new ISB charters in Florida would moot the case by precluding effective relief to Continental Illinois, but ruled that Fla.

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6 827 F.2d at 1522 n.7, 1523, App. 21a, 24a-28a. Prior to August 10, 1987, Section 2(c) of the BHC Act defined "bank" to include any institution that both accepted deposits that the depositor had a legal right to withdraw on demand and engaged in the business of making commercial loans. Bd. of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986).

7 827 F.2d at 1523, App. 28a, citing Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980).

Stat. § 664.02 was unconstitutional and, therefore, invalid. The Court acknowledged that Fla. Stat. § 664.02 was "facially neutral between in-state and out-of-state commerce in its absolute prohibition against the establishment of additional Florida ISBs."[8] However, the Court held that the statute was discriminatory in purpose and in practical effect, concluding that "such protectionist legislation is unconstitutional in the context of non-banks."[9] The attorneys' fee question raised by Continental Illinois' appeal was remanded to the District Court for an explanation of the factual and legal basis for the District

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8 827 F.2d at 1520, App. 12a.
9 827 F.2d at 1521, App. 17a-18a, citing Lewis, 447 U.S. at 38.

Court's denial of Continental Illinois' motion.[10]

Lewis petitioned for rehearing on two grounds. First, in a renewed contention that the case had become moot, Lewis pointed out that while the consolidated appeals were pending for decision by the Court, Section 2(c) of the BHC Act had been amended, effective August 10, 1987, to include within the definition of "bank" any institution that accepts deposits insured by the Federal Deposit Insurance Corporation ("FDIC").[11]

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10 827 F.2d at 1524, App. 30a.
11 Section 2(c)(1)(A) of the BHC Act, 12 U.S.C. § 1841(c)(1)(A), as amended by Act of Aug. 10, 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 554, provides that the term "bank" shall include "[a]n insured bank as defined in section 3(h) of the Federal Deposit Insurance Act." Section 3(h) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1813(h), defines "insured bank" to include "any bank

Because Continental Illinois had proposed that Savings Bank would accept FDIC-insured deposits,[12] and because Continental Illinois could not acquire a "bank" in Florida due to the Douglas Amendment, Lewis contended that approval of the Application was now barred by federal law and that the case was moot. Second, Lewis maintained that the Court of Appeals' decision with respect to Fla. Stat. § 664.02 was ambiguous in its scope and did not comport with this Court's decision in CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987).

Lewis' petition for rehearing was denied on February 26, 1988.[13] At the same time, the Court of Appeals granted Continental Illinois' motion for attorneys' fees under 42 U.S.C. § 1988 for its successful Commerce Clause challenge to Fla. Stat. § 664.02.[14]

. . . the deposits of which are insured in accordance with the provisions of [the FDI Act]."

12 See note 1, supra, and accompanying text.

13 838 F.2d at 458, App. 34a.

ARGUMENT

THIS APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS THAT REQUIRE PLENARY CONSIDERATION BY THIS COURT.

I. THE 1987 AMENDMENT TO SECTION 2(c) OF THE BANK HOLDING COMPANY ACT CLEARLY REQUIRED MODIFICATION OF THE COURT OF APPEALS' OPINION SINCE DETERMINATION OF CONSTITUTIONAL QUESTIONS BY THE COURT WAS NO LONGER PROPER.

The Court of Appeals recognized in its decision of September 22, 1987, that

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14 Id. The Court of Appeals also clarified its mandate by instructing the District Court to reconsider its order concerning attorneys' fees on a de novo basis. The Court of Appeals did not explain the legal or factual basis of its award of attorneys' fees on appeal, but directed the District Court to determine the "reasonable" amount of such fees.

Continental Illinois may not establish an ISB in Florida if that institution falls within the definition of "bank" under Section 2(c) of the BHC Act.[15] Because it is now obvious that the Savings Bank, if established as proposed , would be a "bank" under Section 2(c , as amended effective August 10, 1987, Continental Illinois' proposed institution is not permitted by federal law. Therefore, at least after August 10, 1987, this case did not present the Court of Appeals with a viable dormant Commerce Clause issue.

The Douglas Amendment, at Section 3(d) of the BHC Act, provides that a bank holding company whose principal banking operations are located in one state may not acquire a "bank" in another state

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15 See 827 F.2d at 1521 n.5, 1522 and n.6, 1523, App. 18a-20a, 24a-28a.

unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located." 12 U.S.C. § 1842(d). Pursuant to the Douglas Amendment, Florida has adopted a regional banking statute that permits a bank holding company to acquire a Florida bank only if (i) the bank holding company's principal place of business and more than 80 percent of its subsidiary bank deposits are located within a defined region including Florida, eleven other Southeastern States and the District of Columbia and (ii) the holding company's home state provides reciprocal privileges to Florida bank holding companies.[16] Because Continental

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16 1984 Fla. Laws, ch. 84-42, codified at Fla. Stat. § 658.295. The validity of similar state regional banking laws was upheld by this Court in Northeast Bancorp, Inc. v.

Illinois does not qualify as a "regional bank holding company" under Fla. Stat. §658.295(2)(1), it is not permitted under Florida law and the Douglas Amendment to acquire a "bank" in Florida.

Prior to August 10, 1987, Section 2(c) of the BHC Act defined "bank" to include any institution that both accepted demand deposits and engaged in the business of making commercial loans.[17] Because Fla. Stat. § 664.08(1) prohibits ISBs from accepting demand deposits, the Court of Appeals held that a Florida ISB must always be treated as a "non-bank" for purposes of the BHC Act.[18] Relying on Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 42-49 (1980), the Court ruled that Florida could not constitutionally prohibit the establishment of an ISB by Continental Illinois.

However, Section 101(a) of the Competitive Equality Banking Act of 1987 ("CEBA") amended Section 2(c) of the BHC Act, effective August 10, 1987.[19] As a result of CEBA, the definition of "bank" in Section 2(c) has now been expanded to include every institution that accepts deposits insured by the FDIC. As Lewis pointed out in his petition for rehearing, it is clear that Continental Illinois, as indicated in its Application, proposed that Savings Bank would accept FDIC-insured deposits.[20] Therefore,

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Bd. of Governors, 472 U.S. 159 (1985).

17 See Bd. of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986).

18 827 F.2d at 1521-23, App. 16a-24a; 838 F.2d at 458, App. 32a-34a.

19 Act of Aug. 10, 1987, supra note 11, § 101(a), 101 Stat. 554, codified at 12 U.S.C. § 1841(c)(1)(A).

20 Suggestion of Lewis for Rehearing En Banc, dated Oct. 12, 1987, at p. 6.

Lewis argued that the case had become moot since the Douglas Amendment would not allow Continental Illinois to acquire an FDIC-insured ISB in Florida.

Counsel for Continental Illinois did not dispute that the Application contemplated the acceptance of FDIC-insured deposits by Savings Bank. Instead, counsel argued that the case had not become moot because "it would be possible for Continental Illinois to file a new application making clear that the ISB would not be FDIC-insured."[21] Counsel made no representation as to the actual intent or ability of Continental Illinois to pursue an application for an uninsured ISB. In view of the significant safety and marketing advantages provided to banking institutions by FDIC insurance, the willingness of Continental Illinois to expend resources in establishing an uninsured ISB is certainly open to question.

In denying Lewis' petition for rehearing, the Court of Appeals acknowledged that Section 101(a) of CEBA had "significantly altered the definition of a 'bank,'" and that operation of an FDIC-insured ISB would be a "'banking' activity" for purposes of the BHC Act. However, the Court refused to find that the case had become moot, because "[w]e cannot now guess what the parties will do

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See also note 1, supra, and accompanying text.

21 Response of Continental Illinois to Suggestion of Lewis for Rehearing En Banc, dated Oct. 20, 1987, at 4 (emphasis added). Counsel for Continental Illinois also asserted that the contents of the Application are "not material to this case." Id. at 3. This assertion is highly surprising since the Application provides the factual basis for this litigation.

or not do as a result of the enactment of the August 10, 1987 amendments."[22]

The Court of Appeals clearly erred in failing to amend its judgment in light of CEBA. The Court was required to apply the applicable federal and state law in effect at the time of its decision, and to declare that the case had become moot if the Application sought by Continental Illinois could not be granted due to a change in law.[23] If the Court of Appeals was in doubt concerning the ability or willingness of Continental Illinois to

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22 838 F.2d at 458, App. 34a.

23 Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-15 (1972). See also Lewis, 447 U.S. at 51-53 (remanding issue concerning constitutionality of Fla. Stat. § 660.10 to the District Court for determination of mootness, where it appeared that an amendment to the BHC Act temporarily barred the relief sought by the out-of-state bank holding company challenging § 660.10).

establish an uninsured Florida ISB, it was required to remand the case to the District Court for a determination of this issue. Fusari v. Steinberg 419 U.S. 379, 388-90 (1975); Hall v. Beals, 396 U.S. 45, 49-50 (1960). The Court of Appeals could not ignore the mootness issue and proceed to determine constitutional questions based solely on its inability to "guess" how Continental Illinois might respond to CEBA's amendment of Section 2(c) of the BHC Act.

II. THE COURT OF APPEALS' INVALIDATION OF FLORIDA'S DECISION TO ISSUE NO NEW INDUSTRIAL SAVINGS BANK CHARTERS REPRESENTS AN UNWARRANTED INTERFERENCE WITH STATE CHARTERING AUTHORITY AND IS BASED ON AN ERRONEOUS CONSTRUCTION OF THE COMMERCE CLAUSE.

In addition to its error in deciding substantive issues no longer presented by the case, the Court of Appeals was plainly wrong in holding that Fla. Stat. § 664.02 discriminated against interstate commerce and thereby violated the Commerce Clause. The apparent -- and unprecedented -- result of the decision below is that Florida must process every application for an ISB charter submitted by an out-of-state bank holding company, even though Florida has made an evenhanded and lawful determination that it no longer wishes to issue state ISB charters to any person. In view of this Court's

recent decision in CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987), the holding of the court below represents a clear misapplication of the Commerce Clause to interfere with the long-established authority of each state to determine the conditions under which it will grant charters to banking institutions and other corporations.

In CTS Corp. and in Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), state statutes challenged under the Commerce Clause were upheld based on this Court's findings that the challenged statutes did not (i) discriminate against interstate commerce, (ii) subject interstate activities to conflicting regulations, or (iii) place an undue burden upon interstate commerce. Section 664.02, Florida Statutes, satisfies these

criteria and should, therefore, be upheld.

A. THE DECISION OF THE COURT OF APPEALS, BY REQUIRING FLORIDA TO PROCESS APPLICATIONS FOR INDUSTRIAL SAVINGS BANKS WHEN THE STATE HAS PROHIBITED FURTHER CHARTERS FOR SUCH INSTITUTIONS, REPRESENTS UNREASONABLE INTERFERENCE WITH FLORIDA'S AUTHORITY TO CHARTER DOMESTIC CORPORATIONS.

The decision of the Court of Appeals compels the Department to process Continental Illinois' application for an ISB despite the explicit prohibition enacted by the Florida Legislature in Fla. Stat. § 664.02. Indeed, the terms of the decision are so broadly stated that they might be construed to indefinitely require Florida to process applications for ISBs from any out-of-state bank

holding companies.[24] If the Commerce Clause, as applied by the Court of Appeals, compels Florida to process all applications submitted by out-of-state bank holding companies, then the Equal Protection Clause of the Fourteenth Amendment might prevent Florida from barring applications for ISB charters by other out-of-state persons or even by Florida residents. Thus, the practical effect of the decision below may be to

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24 In his petition for rehearing, Appellant Lewis requested that the Court of Appeals clarify whether its ruling concerning Fla. Stat. § 664.02 applied only to the Continental Illinois application or whether it also applied to any future applications for ISBs by other out-of-state bank holding companies. Suggestion of Lewis for Rehearing En Banc, supra note 20, at 12-13. The Court of Appeals, however, in its opinion denying rehearing, did not further explain the scope of its ruling. See 838 F.2d at 458, App. 32a-34a.

entirely deprive Florida of its authority to determine whether further ISBs in Florida should be chartered.

The Court of Appeals made this error in declaring Fla. Stat. § 664.02 unconstitutional, because it "failed to appreciate the significance for Commerce Clause analysis [of the fact that Florida ISBs, like all Florida corporations, are] entities whose very existence and attributes are a product of state law." CTS Corp., 107 S.Ct. at 1649. Throughout its history, this Court has recognized the plenary authority of each state to regulate the conditions under which its corporations may be chartered and operated.[25] For example, in

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25 E.g., Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 167 (1804) (Opinion for the Court by Marshall, C.J.) (a corporation is "the mere creature of the act to

Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120 (1937), this Court affirmed that the federal Constitution accords broad discretion to each state in determining under what circumstances it will alter or rescind a prior exercise of its chartering authority:

> How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to

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which it owes its existence" and is "capable of exerting its faculties only in the manner which that act authorizes"); Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U.S. 1, 20 (1889) ("A corporation in this country . . . can only have an existence under the express law of the State or sovereignty by which it is created."); Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of State law").

> restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized.[26]

Similarly, in Calder v. Michigan, this Court declined to inquire into the "methods or motives of the legislature" in repealing a corporate charter pursuant to the legislature's reserved powers, even though it was alleged that the repeal was discriminatory and anticompetitive.[27]

The authority of each state to regulate the chartering of financial

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26 302 U.S. at 127-28 (citations omitted). In the case of ISBs, as with other Florida corporations, the Florida Legislature has expressly reserved its authority to "amend, repeal or modify . . . at pleasure" its laws relating to corporate chartering and governance. Fla. Stat. §§ 607.411, 658.30(1)(a), and 664.03(4).

27 218 U.S. 591, 598 (1910) (Opinion for the Court by Holmes, J.).

institutions has commanded special deference from this Court and from Congress. This Court has repeatedly affirmed that the regulation of financial institutions is a matter of "profound local concern."[28] And Congress, in Section 7 of the BHC Act, 12 U.S.C. § 1846, has expressly reserved to each state the power to regulate bank holding companies and their subsidiaries. Although Section 7 does not authorize the states to discriminate against interstate commerce, it does empower them to regulate bank holding companies in a manner that is "more restrictive" than the BHC

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28 Northeast Bancorp, 472 U.S. at 177, quoting Lewis, 447 U.S. at 38. Cf. Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315, 335-39 (1935) (federal government prohibited from authorizing state-chartered thrift institutions to convert to federal charter without state consent).

Act. Lewis, 447 U.S. at 48-49. A state may, for example, choose to prohibit bank holding companies entirely,[29] or to bar all in-state and out-of-state bank holding companies from engaging in a particular kind of banking-related activity that would otherwise be permissible under the BHC Act.[30]

Thus, Florida's prohibition against further ISB charters under Fla. Stat. § 664.02 is a valid exercise of its long-established authority over Florida corporations and financial institutions.

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29 Commercial Nat'l Bank v. Bd. of Governors, 451 F.2d 86, 89 (8th Cir. 1971).

30 Florida Ass'n of Ins. Agents, Inc. v. Bd. of Governors, 591 F.2d 334, 336-39, 342 (5th Cir. 1979) (in view of reserved state powers under Section 7, Federal Reserve Board determinations under Section 4(c)(8) of the BHC Act must comply with Florida law prohibiting bank holding companies from engaging in specified types of insurance activities).

Moreover, as will be shown, because it neither discriminates against nor unduly burdens interstate commerce, this statute does not violate the Commerce Clause.

B. SECTION 664.02, FLORIDA STATUTES, DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Florida's ban on new ISB charters is nondiscriminatory both in its terms and in its effect. The express terms of the statute prohibit the granting of any further ISB charters to any person. Thus, like the Indiana statute upheld in CTS Corp., Fla. Stat. § 664.02 "visits its effects equally upon both interstate and local business."[31]

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31 107 S.Ct. at 1649, quoting Lewis, 447 U.S. at 36.

The Court of Appeals held that, despite the statute's "facial neutrality," the ban on new ISBs was discriminatory in its practical effect. The Court argued that Fla. Stat. § 664.02 would primarily affect those out-of-state, non-regional bank holding companies, which would desire ISB charters only because they could not qualify to acquire full-service Florida banks under Fla. Stat. § 658.295. The Court considered that "in-state [and regional] bank holding companies would normally choose to establish a [full-service] bank, with all its attendant rights, as opposed to an ISB, which has limited functions."[32]

The Court of Appeals recognized, however, that it is operation of the

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32 827 F.2d at 1522, App. 21a.

Douglas Amendment which bars Continental Illinois from establishing a bank in Florida.[33] Accordingly, the inability of non-regional bank holding companies to acquire Florida banks is caused not by Fla. Stat. § 664.02 -- or any other Florida law -- but by federal law, viz., the Douglas Amendment.[34] Thus, the "discrimination" identified by the Court of Appeals has been authorized by federal law and does not offend the Commerce Clause.[35] Fla. Stat. § 664.02 itself does not make any distinction between in-state and out-of-state bank holding companies and, therefore, cannot be said

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33 827 F.2d at 1522 n.6, App. 20a.

34 See note 16, supra, and accompanying text.

35 Northeast Bancorp., 472 U.S. at 174-75.

to discriminate against interstate commerce.[36]

Even if more out-of-state than in-state bank holding companies actually desired ISB charters, that would not establish a claim of discrimination against interstate commerce. As this Court held in CTS Corp. and Exxon, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." CTS Corp., 107 S.Ct. at 1649,

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36 Thus, Fla. Stat. § 664.02 is entirely different from Fla. Stat. § 659.141(1), which was struck down by this Court in Lewis. Unlike Fla. Stat. § 664.02, Section 659.141(1) prohibited only out-of-state banking entities from establishing an investment advisory business in Florida and was, therefore, held to be discriminatory in both its terms and its practical effect. See Lewis, 447 U.S. at 37-44.

quoting Exxon, 437 U.S. at 126. As this Court has pointed out, the critical fact for Commerce Clause analysis is that "nothing in [Fla. Stat. § 664.02 itself] imposes a greater burden on out-of-state [bank holding companies] than it does on similarly situated [Florida bank holding companies]." CTS Corp., 107 S.Ct. at 1649. In fact, as the legislative history of Florida's regional banking plan, discussed infra, shows, Fla. Stat. § 664.02 does little or nothing to impede the very substantial flow of banking services across Florida's borders (including interstate banking services provided by Continental Illinois).[37]

The Court of Appeals relied heavily on its finding that Fla. Stat. § 664.02 had a "protectionist" purpose -- namely,

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37 See Argument, Part II(D), infra.

"to protect Florida banks from competition by financial institutions owned by out-of-state bank holding companies."[38] The Court failed, in its analysis of the legislative history, to recognize the true purpose of the statute. The actual reason for enactment of the statute, as revealed in the legislative history quoted by the Court of Appeals, was the Florida Legislature's "growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking."[39] The passage of Fla. Stat. § 664.02 in June of 1984 was plainly intended to protect the integrity of Florida's regional banking statute, Fla.

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38 827 F.2d at 1521, App. 17a.

39 Committee on Commerce, Fla. House of Representatives, Final Staff Sumamry of HB 801, May 31, 1984, at 2, quoted in 827 F.2d at 1521, App. 16a-17a.

Stat. § 658.295, which had been enacted just one month previously under authority of the Douglas Amendment.

Florida's regional banking program was carefully designed to enable the state to make an orderly and constructive transition from single-state to interstate banking. The purposes of the regional approach were (i) to ensure that the providers of credit in Florida would be responsive to the credit needs of Florida businesses and consumers and (ii) to allow the expansion of local and regional financial institutions so that they could effectively compete with large "money center" financial institutions and thereby preserve a competitive banking environment in Florida.[40] This Court has

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40 Report of the Governor's Committee to Examine the Implications for Florida of Regional Interstate

expressly affirmed the legitimacy of these state objectives in upholding the constitutionality of similar state regional banking statutes.[41]

Florida reasonably believed that its carefully planned regional banking approach would be seriously undermined if non-regional bank holding companies could

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Banking, Feb. 10, 1984 (the "Governor's Committee Report"), at 4-5 (quoting report from Prof. Arnold A. Heggestad); Interstate Bank Expansion: Market Forces and Competitive Realities: The Report of the Florida Interstate Banking Study Group, Jan. 1984 (the "Interstate Banking Study Group Report"), at 7, 231. The Interstate Banking Study Group Report was presented to and relied upon by the Governor's Committee (see Governor's Committee Report at 6). The recommendations contained in the Governor's Committee Report were embodied in Fla. Stat. § 658.295. See Committee on Commerce, Fla. House of Representatives, Final Staff Summary of CS/HB 795, May 22, 1984, at 5.

41 Northeast Bancorp, 472 U.S. at 172-73, 177-78.

evade the Douglas Amendment and acquire FDIC-insured banking institutions in Florida that were treated as "nonbanks" under the BHC Act.[42] Indeed, in 1987 when Congress closed the "nonbank bank loophole" in the BHC Act by expanding the definition of "bank" under Section 2(c) to include all FDIC-insured institutions, one of the principal reasons for its action was to prevent the further

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42 Cf. Florida Dept. of Banking and Finance v. Bd. of Governors, 760 F.2d 1135 (11th Cir. 1985), vacated and remanded sub nom. U.S. Trust Corp. v. Bd. of Governors, 474 U.S. 1098 (1986), on remand, 800 F.2d 1534 (11th Cir. 1986), cert. denied sub nom. Conference of State Bank Supervisors v. Bd. of Governors, 107 S.Ct. 1887 (1987), in which the Court of Appeals twice declared that the acquisition of deposit-taking "nonbank banks" in Florida by non-regional bank holding companies "clearly frustrate[d]" and constituted an "evasion" of the purposes of the Douglas Amendment. 800 F.2d at 1537; 760 F.2d at 1143.

"circumvent[ion]" of regional banking statutes, such as Fla. Stat. § 658.295, by "money center" bank holding companies such as Continental Illinois.[43]

In view of the threatened subversion of Florida's regional banking statute by the "nonbank bank" device, as well as Florida's long-established and plenary authority over the chartering of financial institutions,[44] Florida was not constitutionally required to facilitate the erosion of Fla. Stat. § 658.295 by continuing to grant charters for ISBs. Florida properly sought to maintain the viability of its regional banking statute (which, in seeking to preserve competition, represented a pro-competitive

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43 S. Rep. No. 19, 100th Cong., 1st Sess. 7 (1987), reprinted in 1987 U.S. Code Cong. & Ad. News (No. 8) 489, at 497.

44 See Argument, Part II(A), supra.

rather than a "protectionist" measure) by denying to both in-state and out-of-state persons any further opportunity to establish state-chartered ISBs. Such evenhanded and reasonable state action may not be fairly deemed to violate the Commerce Clause.

C. SECTION 664.02, FLORIDA STATUTES, DOES NOT SUBJECT ACTIVITIES IN INTERSTATE COMMERCE TO CONFLICTING REGULATIONS.

Florida's prohibition against any further charters for ISBs applies only to corporations that Florida has authority to charter. Fla. Stat. § 664.02 does not attempt to regulate the chartering of any out-of-state corporation, nor does any other state have the right to regulate the chartering of Florida ISBs.

As this Court recognized in CTS Corp., 107 S.Ct. at 1649, "[n]o principle of corporation law and practice

is more firmly established than a State's authority to regulate domestic corporations." There is no risk of conflict among the states in chartering corporations so long as each state (as Florida has done here) "regulates [chartering] rights only in the corporations it has created." Id. Because Fla. Stat. §664.02 "does not create an impermissible risk of inconsistent regulation [of corporate chartering] by different States," it should not be found to violate the Commerce Clause. Id.

D. SECTION 664.02, FLORIDA STATUTES, DOES NOT IMPOSE AN UNDUE BURDEN ON INTERSTATE COMMERCE.

Fla. Stat. § 664.02 operates only to bar issuance of a new ISB charter to any in-state or out-of-state person. The statute has, at most, an incidental, de minimis impact on interstate commerce, in

that it does not interfere with the large volume of banking services available across Florida's borders.

As stated above, Fla. Stat. §658.295 allows bank holding companies from eleven other Southeastern states and the District of Columbia, under specified conditions, to acquire and operate banks in Florida.[45] Even non-regional bank holding companies forbidden by the Douglas Amendment and Fla. Stat. §658.295 from acquiring Florida banks may, nevertheless, provide a wide variety of financial services to Florida residents. For example, at the time of enactment of Florida's ban on new ISB charters, out-of-state bank holding companies operated more than 400 offices in Florida

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45 See note 16, supra, and accompanying text.

offering banking and banking-related services. Continental Illinois itself operated four subsidiaries in Florida providing trust, leasing and financial advisory services pursuant to Section 4(c)(8) of the BHC Act.[46] Continental Illinois also operated an "Edge Act" corporation, and its Illinois national bank subsidiary operated a loan production office, in Florida.[47] Moreover,

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46 Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8), authorizes bank holding companies to engage, through nonbanking subsidiaries, in activities that the Federal Reserve Board has determined, by regulation or order, to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto." See 12 C.F.R. §§ 225.21-225.25.

47 An "Edge Act" corporation is an organization authorized to engage in international-related and wholesale banking services pursuant to 12 U.S.C. §§ 611-32. For the powers of Edge Act corporations, see 12 U.S.C. § 615 and 12 C.F.R. § 211.4. A loan production office is an office of a

out-of-state bank holding companies were soliciting deposits from Florida residents by mail and through securities brokerage firms.[48]

The 1984 amendment to Fla. Stat. § 664.02 had no effect on any of these interstate banking services. Thus, in addition to its evenhanded terms, the statute had no material impact upon interstate commerce. Accordingly, if this Court deems it necessary to apply the balancing test stated in Pike v.

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national bank that is authorized to solicit customers for loans (but not to approve or disburse loans). See 12 C.F.R. § 7.7380.

48 The information in this paragraph concerning the 1984 activities of out-of-state bank holding companies (including Continental Illinois) is drawn from the Interstate Banking Study Group Report, supra note 40, at 31-34, 69-95, 104 and 124. Specific information with respect to Continental Illinois' activities in Florida is set forth id. at 79, 82, 87, and 91.

Bruce Church, Inc., 397 U.S. 137 (1970), the slight effect of the statute on interstate commerce would unquestionably be outweighed by the legitimate state purposes accomplished by the statute.[49]

The extensive opportunities for providing interstate banking services in Florida, despite the prohibition against new ISB charters, plainly distinguishes

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49 See Argument, Part II(B), supra. This Court did not apply the Pike v. Bruce Church balancing test in upholding the Indiana statute that was challenged in CTS Corp. One commentator has suggested that, in view of the majority opinion in CTS Corp., the balancing test is not relevant in assessing the validity under the Commerce Clause of state statutes regulating internal corporate affairs. Cox, The Constitutional "Dynamics" of the Internal Affairs Rule - A Comment on CTS Corporation, 13 J. Corp. L. 317, 360-61 (1988). Indeed, Justice Scalia's concurring opinion in CTS Corp., 107 S.Ct. at 1652-53, explicitly rejected the balancing test as a general matter.

Fla. Stat. §664.02 from the North Carolina statute struck down in Best & Co. v. Maxwell, 311 U.S. 454 (1940), on which the Court of Appeals particularly relied.[50] In Maxwell, the challenged state law required any person other than a resident retail merchant to pay a substantial franchise tax before displaying samples in a rented house or hotel room. This Court struck down the statute because there was no practical way for nonresident merchants to display goods in North Carolina without paying the tax. Here, by contrast, Continental Illinois has been able to enter Florida and provide extensive financial services to Florida residents through several offices without interference from

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50 See 827 F.2d at 1522, App. 21a-23a.

Florida's evenhanded prohibition of new ISB charters.

The record reveals no showing of an undue burden on interstate commerce resulting from Fla. Stat. § 664.02. While out-of-state bank holding companies, like their in-state competitors, may no longer establish Florida ISBs -- a single type of financial institution -- this Court has repeatedly rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." CTS Corp., 107 S.Ct. at 1652, quoting Exxon, 437 U.S. at 127. The Commerce Clause does not require Florida to define the chartering rights for ISBs in the same way as any other state. Florida need only provide that residents and nonresidents have equal access to ISB charters, and Florida

has done so by providing that no person may obtain any further ISB charters.[51]

III. THE COURT OF APPEALS' AWARD OF OF ATTORNEYS' FEES ON APPEAL TO CONTINENTAL ILLINOIS, UNDER THE THEORY THAT FLORIDA'S 1984 AMENDMENT OF FLA. STAT. § 664.02 VIOLATED RIGHTS COGNIZABLE UNDER 42 U.S.C. § 1983, IS UNIQUE IN FEDERAL JURISPRUDENCE AND CREATES A DIRECT CONFLICT BETWEEN THE CIRCUITS.

This appeal also presents a civil rights question of great national importance, viz. whether the Commerce Clause creates "rights, privileges, or immunities secured by the Constitution and laws" of such a character that their deprivation is actionable under the federal civil rights statutes. See 42 U.S.C. § 1983. By its award of attorneys' fees, presumably under 42 U.S.C. §

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51 CTS Corp., 107 S.Ct. at 1652.

1988,[52] the Court below implicitly rejected, without explanation, the express rulings in Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984); Private Truck Council of America v. Secretary of State, 503 A.2d 214 (Me.), cert. denied, 106 S.Ct. 1997 (1986); J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); and Connor v. Rivers, 25 F. Supp. 937 (N.D. Ga. 1938), aff'd, 305 U.S. 576 (1939). There is, therefore, now a conflict between the Eleventh Circuit and every other court that has considered whether dormant Commerce Clause claims are cognizable under 42 U.S.C. § 1983.

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52 Although the Court of Appeals did not disclose the basis for its attorneys' fee award, the motion made by Continental Illinois and granted by the Court expressly

In Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979), this Court established that the Supremacy Clause, U.S. Const. art. VI, cl. 2., does not create a civil right independent of whatever right is secured by a prevailing provision of federal law.[53] A violation of the Commerce Clause has been uniformly held to similarly not give rise to cognizable civil rights claims. In Consolidated Freightways, the Eighth Circuit said:

> Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights

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contained this theory. See note 14, supra, and accompanying text.

53 See Chapman, 441 U.S. at 615.

within the meaning of § 1983, neither does the Commerce Clause.[54]

Appellant is unable to find any reported decision, other than the one on appeal in this case, that has authorized the award of attorneys' fees under 42 U.S.C. § 1988 for a sucessful challenge of a state statute on Commerce Clause grounds. The Court of Appeals decision, therefore, represents a vast and unjustified expansion of the scope of the federal civil rights laws. The Court is respectfully urged to accept briefs on the merits and permit oral argument to clarify this important issue.

CONCLUSION

For the reasons stated above, the federal questions presented by this appeal are substantial and require

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54 Consolidated Freightways, 730 F.2d at 1144 (footnotes omitted).

plenary consideration. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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DATED: May 25, 1988.

APPENDIX

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CONTINENTAL ILLINOIS CORPORATION, et al.,
PLAINTIFFS-APPELLEES,
Cross-Appellants,

v.

Gerald A. LEWIS, in his official capacity as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida, Defendant-Appellant, Cross-Appellee.

CONTINENTAL ILLINOIS CORPORATION and William D. Plechaty, et al.,
Plaintiffs-Appellants,

v.

Gerald A. LEWIS, in his official capacity as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida, Defendant-Appellee.

Nos. 85-3165, 85-3949.

United States Court of Appeals,
Eleventh Circuit.

September 22, 1987.

Appeal from the United States

District Court for the Northern District

of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal involves the constitutionality of certain Florida statutes which regulate the conduct and ownership of financial institutions within the state of Florida.

To afford a better understanding of the case, an overview of certain relevant history is necessary. In 1972 Bankers Trust New York Corporation ("Bankers Trust"), a New York corporation operating as a bank holding company, sought federal approval to operate an investment management subsidiary in Florida. The Federal Reserve System's Board of Governors ("Board") denied Bankers Trust's application, citing Fla. Stat. § 659.141(1)

(amended 1980), which the Board concluded was intended to, and did, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. Bankers Trust then instituted an action in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief. A three-judge district court concluded that § 659.141(1)[1]

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This statute provided as follows:
659.141 Control; ownership.-

(1) Except as provided in subsection (3), no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all, or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory

was unconstitutional because it placed an unjustified burden on out-of-state businesses, in violation of the Commerce Clause of the United States Constitution.

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services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from the effective date of this act or from the the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of 2 years from time to time if it determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed 1 year and all thereof shall not in the aggregate exceed 3 years.

BT Investment Managers, Inc. v. Lewis, 461 F.Supp. 1187 (N.D.Fla.1978). The United States Supreme Court affirmed. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

The Supreme Court issued its decision in Lewis on June 9, 1980. In July, 1980 the Florida legislature enacted Fla. Stat. § 658.29,[2] section one

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This statute states:

658.29 Certain ownership and control prohibited.

(1) Except as provided in subsection (3), no bank, trust company, or bank holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all, or substantially all, of the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of

of which is, in all pertinent ways, identical to § 659.141(1), previously declared unconstitutional. At the same time the legislature enacted Fla.Stat. §

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business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or bank holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, becomes disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from the date it becomes disqualified hereunder, unless such period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend the 2-year period from time to time if it determines that any such extension would not be detrimental to the public interest; but any such extension shall not exceed 1 year, and all extensions shall not in the aggregate exceed 3 years.

664.03(3) which section extends the application of § 658.29 to cover industrial savings banks ("ISBs").[3]

On June 29, 1981, Continental Illinois Corporation ("Continental"), a bank holding company incorporated in Delaware with its principal place of business in Illinois, applied to the Florida Department of Banking and Finance

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3 Industrial savings banks are considered "non-banks" because they operate under certain limitations not applicable to banks. For example, under federal law ISBs can accept only certain types of deposits and cannot make commercial loans. Their utility lies in the avoidance of certain federal regulations relating to banks. Specifically, as "non-banks" ISBs are not subject to § 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841, et seq. (1980 & West Supp. 1987) ("BHCA"), which prohibits a bank holding company from owning or establishing a "bank" outside its principal operating state, unless the acquisition is expressly authorized by statutory law of the state in which the proposed acquisition is located. Id., 12 U.S.C. § 1842(d).

for a charter to operate an ISB to be known as Continental Illinois Savings Bank of Dade County.[4] The defendant, Gerald A. Lewis, the Florida Comptroller, rejected this application, refusing to process it in reliance on the prohibition contained in § 664.03(3) against out-of-state ownership of in-state ISBs.

On August 6, 1981, Continental filed a complaint in the United States District Court for the Northern District of Florida, seeking a declaratory judgment that the two statutes, §§ 658.29 and 664.03(3), were unconstitutional, and also seeking injunctive relief. The district court granted summary judgment for Continental, finding that although § 664.03(3) was facially constitutional it was unconstitutional as applied to Continental. According to the district court this statute, through its prohibition of Continental's establishment of a non-bank in Florida, violated the Commerce Clause. The district court ordered Florida to process Continental's application. Lewis filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). During the pendency of this motion, the Florida legislature enacted a permanent moratorium on the issuance of charters for any additional ISBs in Florida, whether to be owned by in-state or out-of-state concerns. Fla.Stat. § 664.02(1) (1984) (amended in 1984 to include this moratorium). The defendant then filed a suggestion of mootness, contending that it now had no

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4 Continental was joined in this application by the remaining plaintiffs below. All plaintiffs will be referred to collectively as "Continental."

authority to grant the relief ordered by the district court. The district court refused to find the case moot, noting that final judgment had been rendered prior to the legislature's amendment of § 664.02 and, additionally, holding that the issues are "capable of repetition, yet evading review," citing Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, 316 (1911).

In this appeal the defendant seeks the dismissal of the appeal as moot or, alternatively, a reversal of the district court's determination that § 664.03(3) is unconstitutional as applied. On cross-appeal Continental asks this court to declare § 664.02 either unconstitutional or inapplicable, and also challenges the district court's holding that

§ 664.03(3) is facially constitutional. Finally, Continental seeks a reversal of the district court's denial of its motion for attorney's fees.

Section 664.02.

Lewis contends that Fla.Stat. § 664.02, as a statutory ban on the issuance of charters for new ISBs, renders this entire controversy moot. This issue of mootness hinges, of course, on whether the amendment to § 664.02 is constitutional. If constitutional, then we agree with the defendant that the statute precludes effective relief and moots the case. C & C Products, Inc. v. Messick, 700 F.2d 635 (11th Cir. 1983). If unconstitutional, however, the statute would not affect the availability of the relief ordered by the district court.

Section 664.02 provides, in pertinent part:

Effect on existing industrial savings banks; prohibition on new charters.-

(1) The charters of industrial savings banks existing at the time of adoption of this chapter shall continue in full force and effect, but no new charter shall be granted for an industrial savings bank.

By its terms this statute is facially neutral between in-state and out-of-state commerce in its absolute prohibition against the establishment of additional Florida ISBs. The defendant relies on this facial neutrality as proof that the statute does not violate the Commerce Clause. Our analysis, however, requires more in-depth consideration of

the statute than that proposed by the defendant.

[1,2] The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. art. 1, § 8, cl. 3. Although this language acts as a specific grant of power to Congress, the Supreme Court has long recognized that it also acts as a limitation on the power of the states to erect barriers against interstate trade. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702, 711 (1980) (citations omitted). In the absence of conflicting federal legislation, the states, pursuant to their police powers, retain the authority to regulate matters of "legitimate" public concern, even when interstate commerce is

affected. See e.g., Raymond Motor Transportation Inc. v. Rice, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). Yet even where legitimate local interests are implicated, the state must not act in a manner which places them in economic isolation. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). In essence, the state interest "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27, 98 S.Ct. 2531, 2537, 57 L.Ed.2d 475, 483 (1978).

[3] The analysis necessary for a determination of whether a facially neutral state statute is unconstitutional

under the Commerce Clause involves the same central inquiry as when the evaluation is applied to a facially discriminatory state statute. The primary focus in both instances is whether the "practical operation" or the "probable effect" of the challenged statute is discriminatory. In summary, discriminatory protectionist legislation is per se unconstitutional under the analysis applied in City of Philadelphia v. New Jersey, supra, ("where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected"). Alternatively, narrowly drawn state legislation which serves legitimate local purposes and is neutral in its effect upon local and interstate commerce is permissible if it survives scrutiny under the balancing test set forth in

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Under both tests, however,

> [t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.
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> Lewis, 447 U.S. at 37, 100 S.Ct. at 2016, 64 L.Ed.2d at 712.

[4] The fact that the legislation challenged in this action does not serve a valid local purpose is evidenced by the legislative history of § 664.02. The significant portion of this history reveals that

> Sections 34 and 35 of the bill were included in the bill because of growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking. Two years ago, the legislature imposed a one-year moratorium on the issuance of new ISB charters pending the outcome of litigation over the application of Continental Illinois Corporation to establish ISBs in Florida. A federal court in Florida has now ruled in favor of Continental

> Illinois, and in the wake of that decision both Citicorp and BankAmerican Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.
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> Accordingly, except for a temporary charter issued to facilitate a cross-industry conversion, merger, or acquisition, section 34 of the bill prohibits the issuance of any new industrial savings bank charters thus limiting the number of ISBs to the three that currently exist.

Committee on Commerce, Florida House of Representatives, Final Staff Summary of HB 801, at 2-3, May 31, 1984.

Thus, the avowed purpose of this statute is to protect Florida banks from competition by financial institutions owned by out-of-state holding companies. In Lewis the Supreme Court made clear that such protectionist legislation is

unconstitutional in the context of non-banks.[5] As the Court pointed out, while banking and related financial

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In support of its contention that the statute is justified by a local interest sufficient to withstand a Commerce Clause challenge, the defendant relies primarily on the Supreme Court's opinion in Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985). This reliance is misplaced. Northeast Bancorp dealt only with the constitutionality of certain state statutes authorizing interstate bank acquisitions on a regional basis. According to the Court these statutes did not violate the Commerce Clause despite the fact that non-regional bank holding companies were not allowed entry into a state's banking. The Court reached this conclusion based on the fact that this case did not present a dormant Commerce Clause issue. Congress has enacted legislation prohibiting the acquisition or expansion of banking subsidiaries across state lines, absent specific statutory authorization by the state in which the proposed authorization by the state in which the proposed acquisition is located. BHCA, 12 U.S.C. § 1842(d). Therefore, the Court held that in enacting such authorization for acquisitions, the Douglas Amendment granted states flexibility in drafting their statutes.

activities are matters of profound local concern, they also contain important interstate attributes. Id. at 38, 100 S.Ct. at 2016, 64 L.Ed.2d at 713. The Court held that despite valid local

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Crucial to an understanding of the distinction between Northeast Bancorp and the present case is the fact that Northeast Bancorp involved the acquisition of banks, an area in which Congress has acted. The present case does not involve banks, rather it applies only to ISBs, concededly non-banks. Congress has not acted to exclude similar establishment or acquisition of non-banks and therefore, Northeast Bancorp is not controlling. As the Court noted in Northeast Bancorp,

> There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject.

Id. at 174, 105 S.Ct. at 2553-54, 86 L.Ed.2d at 125, citing Lewis, 447 U.S. 27, 39-44, 100 S.Ct. 2009, 2017-19, 64 L.Ed.2d 702, 713-17.

concerns "the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." Id. at 42, 100 S.Ct. at 2019, 64 L.Ed.2d at 716.

Moreover, it is clear that regardless of the statute's facial neutrality the effect of the law is to erect an insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies. While in-state bank holding companies are also precluded from establishing ISBs, they have the alternative of establishing traditional banks and thereby gaining access to Florida deposits.[6] In fact, we must assume that

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As discussed in footnote 3, supra, § 3(d) of the BHCA made this alternative unavailable to out-of-state bank holding companies.

in-state bank holding companies would normally choose to establish a bank, with all its attendant rights, as opposed to an ISB, which has limited functions.[7]

The Supreme Court has emphasized that careful scrutiny is required, for Commerce Clause purposes, in order to uncover "ingenious" state statutes which appear neutral but whose practical operation discriminates against inter-

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The BHCA defines a bank as any institution organized under state or federal law which "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c). Florida ISBs are clearly not banks. Although they are authorized to make commercial loans, they may not take demand deposit accounts. Florida ISBs may accept negotiable order of withdrawal ("NOW") accounts, but NOW accounts are not considered demand deposit accounts under the BHCA. Federal Reserve Board v. Dimension Financial Corp., 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986).

state commerce. In Best & Co., Inc. v. Maxwell, 311 U.S. 454, 61 St.Ct. 334, 85 L.Ed. 275 (1940), the Court considered a challenge by a New York retailer to a $250.00 North Carolina tax on every person "not a regular retail merchant in the state," who displayed samples in a temporarily occupied hotel room for the purpose of securing retail order. Although the tax was facially neutral the Court found it to be an unconstitutional subterfuge for discrimination against out-of-state salespeople. The Court held:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must

> assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as 'regular retail merchants in the State of North Carolina' . . . . Interstate commerce can hardly survive in so hostile an atmosphere.
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> . . . .
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> The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

Id. at 455-57, 61 S.Ct. at 335-36, 85 L.Ed. at 277-78. (Citations omitted.)

In summary we find that, although artfully drafted, the practical effect of

§ 664.02 and its stated purpose is the protection of in-state banking from competition by financial institutions owned by out-of-state bank holding companies. The Commerce Clause prohibits a state from using its regulatory power in such a manner to protect its own citizens from outside competition. Section 664.02 is unconstitutional, and therefore does not moot the controversy presented by this case. We now turn to a consideration of the constitutionality of the two other Florida statutes involved in this action.

Sections 658.29 and 664.03(3).

[5] In conjunction Fla.Stat. §§ 658.29 and 664.03(3) prohibit non-Florida bank holding companies from operating ISBs in Florida. The district court found this prohibition to be facially

constitutional, but unconstitutional as applied to Continental. We affirm the district court in its conclusion that the statutes are unconstitutional as applied to Continental, but we disagree with the court's holding of facial validity.

The district court's determination that these statutes were facially constitutional was premised on its conclusion that Florida ISBs are authorized, under Florida law, to act as "banks," and therefore can constitutionally be prohibited from entry into the Florida banking market pursuant to the Douglas Amendment to the Banking Holding Company Act of 1956 ("BHCA") 18 U.S.C. § 1842(d) (West Supp. 1987).[8] According to Florida law, an ISB is not authorized to accept demand deposits. However, negotiable order of

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8 See footnote 5, supra.

withdrawal ("NOW") accounts are permissible. Fla.Stat. § 664.08(1) (1984). Concomitant with the charter for a state ISB is the authority to engage in commercial loan transactions. Fla.Stat. § 664.07 (1984). Based on two decisions (one administrative and one judicial) that the term "demand deposit" includes within its ambit NOW accounts, the district court determined that by offering NOW accounts and having the authority to make commercial loans Florida ISBs could operate as "banks" within the definition contained in the BHCA.[9]

In First Reserve Board v. Dimension Financial Corp., 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986), the Supreme Court held that NOW account deposits are not a form of demand deposit, observing

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See footnote 6, supra.

that financial institutions offering NOW accounts retain a seldom exercised but nevertheless absolute right to require prior notice of withdrawal. Id. at 367, 106 S.Ct. at 685, 88 L.Ed.2d at 698. Florida ISBs are therefore not able to offer demand accounts and are not banks as defined by the BHCA. For this reason we reverse the district court's decision that the statutes are facially constitutional, finding, for the reasons stated below, that Florida's attempt to prohibit out-of-state ownership of in-state non-banks is unconstitutional.

Although the district court found the statutes facially constitutional, it held that the statutes were unconstitutional as applied to Continental. According to the court, even if Continental was authorized by Florida law to act

as a bank, federal law prohibits ISBs from making commercial loans and therefore Continental is precluded from actually engaging in one of the two activities required to fulfill the definition of banking. Because Continental could not operate as a bank under the BHCA, the district court held that the Florida legislation excluding a non-bank owned by an out-of-state bank holding company was in derogation of the Commerce Clause. We agree. The Supreme Court made it abundantly clear in Lewis that states are not free to exclude non-banks based on geographic factors. Lewis is therefore controlling.

[6] As noted earlier, Continental moved for attorney's fees, which motion was denied by district court. Continen-

tal's motion was made pursuant to 42 U.S.C. § 1988 (1981) or, in the alternative "pursuant to the court's inherent power to award such fees for 'bad faith.'" The defendant opposed the motion on several grounds. First the defendant argued that the motion was untimely. The defendant also urged that it was unfairly surprised and prejudiced by Continental's motion to the extent it sought attorney's fees under § 1988. Finally, the defendant contended that the plaintiffs could not have prevailed under § 1983. In its order denying the plaintiff's motion the district court said only that it had "reviewed the arguments of the parties and the relevant case law" and had determined that the motion should be denied, without stating its reasons

for the denial. Although we review the district court's denial of attorney's fees only for an abuse of discretion, without any explanation it is impossible for us to discern the correctness of the district court's judgment. It is necessary, therefore, to remand the case to the district court for an explanation of the basis for its denial of the plaintiff's motion for attorney's fees.

Consequently, we AFFIRM the district court's determination that § 664.02 does not moot the appeal. We AFFIRM the judgment of the district court that, in conjunction, §§ 658.29 and 664.03(3) are unconstitutional. We REMAND the case to the district court for further findings and the legal basis for its denial of the plaintiff's motion for attorney's fees.

CONTINENTAL ILLINOIS CORPORATION, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

Gerald A. LEWIS, in his official capacity as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida, Defendant-Appellant,

Cross-Appellee.

CONTINENTAL ILLINOIS CORPORATION and William D. Plechaty, et al.,
Plaintiffs-Appellants,

v.

Gerald A. LEWIS, in his official capacity as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida, Defendant-Appellee.

Nos. 85-3165, 85-3949.

United States Court of Appeals,
Eleventh Circuit.

February 26, 1988.

ON PETITION FOR REHEARING

(Opinion Sept. 22, 1987, 11th Cir., 827 F.2d 1517).

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Pursuant to Eleventh Circuit Rule 35-6, we treat Lewis' suggestion for rehearing in banc as a petition for rehearing before the original panel. Although we decline to alter our conclusion that the challenged Florida statutes are unconstitutional, we make the following clarification of our previous panel opinion.

The President signed the Competitive Equality Banking Act of 1987 ("CEBA") into law on August 10, 1987. The CEBA amended the definition of a "bank" under the Bank Holding Company Act, 12 U.S.C. § 1841 et seq. ("BHCA"). Our previous panel decision, 827 F.2d 1517, which issued on September 22, 1987, did not address these amendments, which broaden

the definition of a "bank."[1] Consequently, insofar as our previous panel decision interprets a bank holding company's operation of an industrial savings bank ("ISB") to be always a "non-banking" activity, 827 F.2d at 1519 n. 3, 1521 n. 5, 1523, we were not construing the amended BHCA.

Although the petitioner is correct that the amendments to the BHCA have

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1 Before the amendments, the BHCA defined a bank as any institution organized under state or federal law which accepts demand deposits and makes commercial loans. See Federal Reserve Board v. Dimension Financial Corp., 474 U.S. 361, 106 S.Ct. 688, 99 L.Ed.2d 691 (1986). The amended definition also includes also all institutions whose deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"), 12 U.S.C. § 1841(c)(1)(A), (as amended), as well as all institutions organized under state or federal law that accept "deposits that the depositor may withdraw by check or

significantly altered the definition of a "bank," we do not agree that the amendments necessarily would make Continental's operation of an ISB in Florida a "banking" activity in every instance. Our prior opinion dealt only with the issues presented to the district court. We cannot now guess what the parties will do or not do as a result of the enactment of the August 10, 1987 amendments. Thus, we reject petitioner's argument that the amendments to the BHCA have mooted this controversy. Therefore, the petition for rehearing is DENIED.

In our previous panel opinion, we concluded that "it is necessary to remand the case to the district court for an explanation of the basis for its denial

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similar means for payment to third parties" and make commercial loans. 12 U.S.C.§ 1841(c)(1)(B) (as amended).

of the plaintiff's motion for attorney's fees." 827 F.2d at 1524 (emphasis added). Continental Illinois now moves for an order clarifying our mandate in order to permit the district court on remand to reconsider its denial of attorneys' fees if otherwise appropriate. Upon consideration of this motion, we make this clarification. Our previous panel opinion stated only that we could not review the district court's ruling for abuse of discretion because the district court provided neither sufficient findings nor a legal basis for its decision. The decision to remand the case to the district court does not preclude de novo review of the attorney's fees issue by the district court, and we direct that the district court consider this issue de novo on remand.

Continental Illinois also moves for attorney's fees on appeal. The motion is GRANTED, and we remand the case to the district court for determination of reasonable attorney's fees on appeal.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONTINENTAL ILLINOIS CORPORATION, WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK AND ROBERT J. FIDDES, Plaintiffs,	) TCA 81-0944-WS
v.	
GERALD A. LEWIS, as Comptroller of the State of Florida, etc., Defendant.	

ORDER

Before the court is plaintiffs' motion for summary judgment (document 23) to which defendant has responded and plaintiffs have supplementally replied. It appearing to the court that there are no issues of fact remaining for consideration, summary judgment is appropriate.

On June 29, 1981, plaintiffs filed with the Florida Department of Banking, hereinafter "defendant," an application for authorization to conduct the business of an industrial savings (Morris Plan) bank (ISB) pursuant to Chapter 664 of the Florida Statutes (1981). The defendant by compulson of Fla. Stat. § 664.03(14) (1981) [1/] as it incorporates Fla. Stat. § 658.29(1) (1981), denied the plaintiffs' application. Defendant asserted that plaintiff Continental Illinois Corp. is a "bank holding company" [2/] ("BHC") and therefore is precluded by Florida and federal law from owning a Florida ISB.

Plaintiffs therefore filed a complaint for declaratory judgment and injunctive relief (document 1) and a motion for preliminary injunction (document 3). Plaintiffs' contention is that

Fla. Stat. § 658.29(1) is unconstitutional facially and as applied, as violative of the commerce clause. In support of their contention, plaintiffs point to BTMI v. Lewis, 447 U.S. 27 (1980), which held unconstitutional portions of Fla. Stat. § 659.141(1) (1979), a nearly identical predecessor to § 658.29(1) (1981).

After evidentiary hearing and due consideration of arguments presented by counsel, the court entered a preliminary injunction. Defendant was ordered to disregard § 664.03(14) as it incorporates § 658.29(1)(1981), and to process, in ordinary course of business, plaintiffs' application to operate an ISB in the State of Florida (document 19).

In response, the Florida legislature amended Fla. Stat., Chapter 664, and

provided that the new charters for ISB's -- whether foreign or domestic owned -- could not be granted prior to July 1, 1983. See 1982 Fla. Laws 82-214, Fla. Stat. § 664.02(2) (1982 Supp.).

In deciding whether the statutes at issue [3] are constitutional, a dichotomous analysis is required. First, are the statutes facially unconstitutional? Second, are they unconstitutional as applied?

I. FACIAL CHALLENGE

Defendant claims that § 664.03(14), which incorporates § 658.29(1) (1981), is constitutionally and congressionally authorized by § 3(d) of the Bank Holding Company Act (BHCA). [4] Section 3(d) states that the Federal Reserve Board may not permit a BHC to own or acquire a "bank" outside of its principal operating state, unless the

acquisition is expressly authorized by the statutory law of the state in which the proposed acquisition is located. Assuming that an ISB is a "bank" under the BHCA, then the portions of Fla. Stat. § 658.29(1) (1981) relating to "banking", standing alone, are clearly constitutional.

Under § 2(c) of the BHCA, [5] a "bank" is an institution which accepts demand deposits and engages in commercial loan transactions. This is a conjunctive test.

Furthermore, the Federal Reserve Board has promulgated rules as respects ISB's. In 12 CFR § 225.4(a)(2)(1983), the rules state:

> [A]ny bank holding company may engage, or retain or acquire an interest in a company that engages, solely in one or more of the activities specified below . . .:

* * *

> Operating as an industrial bank, Morris Plan Bank, or industrial loan company, in the manner authorized by state law so long as the institution does not both accept demand deposits and make commercial loans. (emphasis supplied). [6/]

Pursuant to Florida law, an ISB is not authorized to accept demand deposits. Instead, negotiable order of withdrawal (NOW) accounts are permissible. Fla. Stat. § 664.08(1) (1981). Concomitant with the charter for a state ISB is the authority to engage in commercial loan transactions. Fla. Stat. § 664.07 (1981). Ignoring, for the moment, the obvious interpretational problems in the federal rule, 12 CFR § 225.4(a)(2) (1983), the court must decide if a Florida ISB is a § 2(c) "bank."

Recent judicial and administrative constructions of "demand deposit" have concluded that the term includes within

its ambit NOW accounts. See First Bancorporation, 68 Fed. Res. Bul. 253 (1982) [7/] and Wilshire Oil Co. v. Federal Reserve, 668 F.2d 732 (3rd Cir. 1981). Assuming these decisions correct, then an entity chartered as an ISB under Florida law, Fla. Stat. Chapter 664 (1981), would be authorized to act as a § 2(c) "Bank," although it would not be compelled to engage in commercial loan transactions, nor would it be required to offer NOW accounts. [8/]

However, 12 CFR § 225.4(a)(2)(1983) expressly states that a foreign BHC may own an ISB. It restricts that ownership only "to the manner authorized by state law" and precludes acceptance of demand deposits if the institution engages in making commercial loans. The "manner authorized" by Florida is no operation of an ISB by a foreign BHC at all. Since

Florida has chosen to regulate ISB's as banks, i.e., by permitting NOW account/ demand deposits and permitting commercial loan transactions, then Florida's decision to exclude a BHC-owned ISB is clearly permissible in light of the Federal Reserve Board's grant of that authority.

The facial constitutionality is further bolstered by the court's dicta in Lewis v. BTIM, Inc., 447 U.S. 27, at 47, that

> The language of [§ 3(d)] establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the states is the authority to create exceptions to this general prohibition, that is, to permit expansion of banking across state lines where it otherwise would be federally prohibited.

Accepting the above dictum as a correct construction of § 3(d), then the state may only act to permit that which is

prohibited. Section 3(d) prohibits "banking activities by out-of-state bank holding companies." A Florida ISB is clearly authorized to engage in banking activities. The state has chosen, pursuant to § 3(d), to exclude the ownerships prohibited by the federal regime. 9/ This is clearly permissible, insofar as Florida is regulating ISB's as "banks" by authorizing demand deposits (NOW accounts) and commercial loan transactions.

The regulation, 12 CFR § 225.4(a)(2), is not contrary. The "manner authorized" by Florida law is no operation at all. The state is therefore within the parameter of the rule. Facially, Fla. Stat. §664.03(14) is valid. 10/

II. CONSTITUTIONALITY OF § 664.02(14) AS APPLIED

Although the Florida Statutes, by

operation of 12 CFR § 225.4(a)(2) and § 3(d) of the BHCA is facially valid, it faces a stiffer challenge when applied to the plaintiffs. This is primarily due to the distinction between "authorization" and "engaging." Under Florida law, an ISB is authorized to make commercial loans, and is authorized to accept NOW accounts (presumably demand deposits). But, under the regulations, 12 CFR § 225.4(a)(2), an ISB is a permissible § 4(c)(8) activity as long as it does not "make commercial loans." Thus, if granted a charter to operate a Florida ISB, plaintiffs would be authorized by state law to "make commercial loans" although, because of federal law, they would not be permitted to do so.

Indeed, were the plaintiffs to make commercial loans, they would be violating § 3(d) of the BHCA and 12 CFR § 225.4(a)

(2). Therefore, even if plaintiffs desired to make commercial loans, they would be precluded so long as they concurrently offered NOW accounts. 11/

In essence, given the federal regulation, in the context of the § 2(c) definition of bank, plaintiffs' proposed institution is not and cannot be a "bank", regardless of the authorization of Fla. Stat. § 664.08 (1982).

The Florida Statute's exclusion of a permissible entity which will engage only in permissible transactions is unconstitutionally broad and in derogation of the commerce clause. 11/ Lewis v. Bankers Trust Investment Managers, 447 U.S. 27, 44-49 (1980); Pike v. Bruce Church, 397 U.S. 137 (1970).

Accordingly, it is ORDERED and ADJUDGED:

1. The plaintiffs' motion for permanent injunction is hereby granted.

2. Defendant shall not exclude bank holding companies from operating Industrial Savings Banks in the State of Florida because of Fla. Stat. § 664.03 (14) (1981), now § 664.03(13) (1982).

3. Defendant is directed to accept for processing in the regular course of business the plaintiffs' application to establish an ISB in Florida.

DONE and ORDERED this 13th day of December, 1983.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTES to Order Entered December 13, 1983--Case # TCA 81-0944-WS

1/ Now amended and codified at Fla. Stat. 664.03(13)(1982).

2/ As defined in the Bank Holding Company Act of 1956, as amended and codified at 12 U.S.C. § 1841 et seq.

3/ Plaintiffs claim the "statute at issue" is Fla. Stat. 658.29(1)(1981). Defendants claim it is § 664.03(14) which should be tested for constitutionality.

4/ 12 U.S.C. § 1842(d).

5/ 12 U.S.C. § 1841(c).

6/ The rule is authorized by 12 U.S.C. § 1843(c) (8) § 4(c)(8) of the BHCA, which permits a BHC to own a "closely related entity." The states may not exclude a § 4(c)(8) institution from operating within its boundaries.

7/ On APPEAL, Case No. 82-1401 (10th Cir. 1982). As noted by plaintiffs, the Board's determination is "entitled to almost conclusive effect." (memorandum of law in support of summary judgment, document 23, at 45-46).

8/ At the time the court issued its preliminary injunction, then-current rulings and interpretations held that NOW accounts were not functionally equivalent to demand deposits.

9/ Of course, had the state not acted at all, a BHC would still be pretermitted from owning a Florida "bank." It is because of 12 CFR § 225.4(a)(2) that the state is authorized to restrict a "permissible" activity.

10/ The court has not addressed the presumed facial validity of Fla. Stat. § 658.29(1). Although portions of that same statute were held unconstitutional in BTIM, they were altogether distinct from the portions here at issue. Section 658.29 states that "no . . . bankholding company [from out-of-state] shall . . . own . . . any bank . . . in this state . . ." This statute is unnecessary, but permissible by § 3(d) of the BHCA.

11/ Defendant could avoid this result only by requiring all chartered ISB's in Florida to make commercial loans. With such a provision, cetarus paribus, then BHC's may not own an ISB which accepts demand deposits or NOW accounts.

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONTINENTAL ILLINOIS CORPORATION, et al.,	)	
Plaintiffs,	)	TCA 81-0944-WS
v.	)	
GERALD LEWIS, as Comptroller of Florida, etc.,	)	
Defendant.	)	

FINAL JUDGMENT NUNC PRO TUNC

On December 13, 1983, this Court entered an order (document 42) granting plaintiffs' motion embodied in Document 22 titled "Motion for Summary Judgment and the Entry of a Permanent Injunction." Document 23 is plaintiffs' memorandum of law in support of the motion. It is document 23 to which the court refers in its December 13 order. Since the entry

of that order, the case has gone procedurally awry. This memorandum opinion is intended to set the record straight and to dispose of all pending motions.

THE FINALITY OF THE DECEMBER 13 ORDER

The first step in this direction is to acknowledge or declare that the December 13 order was and is a final judgment within the meaning of Federal Rules of Civil Procedure 54 and 58. To take this step, the court must employ Rule 60(a), Federal Rule of Civil Procedure, and correct the clerical mistake "arising from oversight or omission" in not entering final judgment on a separate form as required by Rule 58 and Rule 79(b), Federal Rules of Civil Procedure.

It is clear from the December 13 order that it was intended as a final order within the meaning of Rule 54

because it "adjudicat[ed] all the claims and the rights and liabilities of all the parties." Fed.R.Civ.Proc. 54(b). See, C. Wright, A. Miller & M. Kane, Fed. Prac. and Proc. § 2651. However, the effect of the order was unclear for the purpose of the clerk's performance of his ministerial duties because it is entitled "Order;" it erroneously refers to "Plaintiffs' Motion for Summary Judgment" instead of "Plaintiffs' Motion for Summary Judgment and the Entry of a Permanent Injunction;" it erroneously refers to the motion as document 23, the memorandum in support, instead of document 22, the actual motion; and in the paragraph summarizing the adjudication, it refers to "Plaintiffs' Motion for Permanent Injunction" without a document number rather than the formal title of

the motion with document number 22. Hence, it is easy to see why the clerk would not have entered judgment on a separate form as required by the rules, especially since the order did not explicitly order entry of judgment.

This omission by the clerk, however, can now be rectified under the Rule 60(a). The court perceives the error as one on its part in incorrectly titling the order, thereby preventing the clerk from following the standard procedures. However, whether there was an error on the part of the clerk or on the part of the court in rendering the judgment is immaterial because the mistake was "clerical" within the meaning of Rule 60(a). See, Pattiz v. Schwartz, 386 F.2d 300, 303 (8th Cir. 1968) (per Blackmun, J.) quoting 6A Moore's Federal Practice §

60.06 p. 4044 (2d Ed. 1966). The correction under Rule 60 will simply result in the record "speaking the truth." Id.

Furthermore, it is clear from the actions of the parties that they considered the order as a final judgment. The defendant timely filed a motion to alter or amend judgment (document 43) pursuant to Rule 59(e) indicating his understanding that the judgment was final. Plaintiffs' response to motion to alter or amend judgment (document 47) clearly shows that plaintiffs also understood the judgment to be final. Thus, by treating the dispositive order as a final judgment, the parties have waived any objection to the technical requirement of a separate document entering final judg-

ment. Diaz v. Schwerman Trucking Co., 709 F.2d 1371, n.1 (11th Cir. 1983).

The finality of the judgment in this case has become important because after defendant's initial motion to amend and plaintiffs' response, the parties begin to raise completely new issues, claims, and constitutional challenges that were never pled or considered in the original action. But before discussing these new problems, the court will dispose of defendant's motion to alter or amend.

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

Defendant raises the following points in his motion to alter or amend judgment (document 43):

1. Defendant is precluded as a matter of law from granting plaintiffs' application because, by not offering both demand deposits and commercial loans,

plaintiffs cannot meet the "public convenience and advantage" requirement of Section 658.21(1), Florida Statutes (1981).

2. Following the first point, since plaintiffs are required to both accept demand deposits and make commercial loans under Florida law, they are a "bank" under federal law and the linchpin of the December 13 order disappears.

3. Plaintiffs cannot as a matter of law compete within the service area since they will not make commercial loans and so cannot meet Section 658.21(2) requirements.

4. The court's ruling is premature because the administrative record was incomplete.

Defendant then asks the court hold Section 664.03(14), Florida Statutes

constitutional or to leave the question open. Plaintiffs responded to defendant's motion in document 47. [1/]

The contentions raised in defendant's motion to alter or amend are without merit. The argument based on Section 658.21 was never raised even though the court specifically asked whether defendant could grant an application for a Morris Plan institution that could not make commercial loans. Order, June 24, 1982 at 2 (document 37). Defendant's response was a resounding "maybe," but, significantly, Section 658.21 was never raised as a bar. Additionally, the court cannot understand how a discretionary power can be precluded as a matter of law. Since defendant's first point fails, its second point must necessarily fail because it is dependent

on the validity of the first point. Likewise, defendant's third point, based on Section 658.21(2) suffers from the same infirmity as the first point and must fail.

As to defendant's fourth point, defendant will not now be heard to say this court's decree prevented the development of an administrative record when defendant denied the original application and now maintains through his motion that he would still be compelled to deny any further applications. Therefore, defendant's motion to alter or amend judgment (document 43) is DENIED.

In the ordinary case, such a ruling would end the matter. However, the occurrence of certain events subsequent to the December 13 order requires the

court to delve further into the procedural complexities of the case.

DOCUMENT 50 - PLAINTIFFS' SUPPLEMENTAL RESPONSE

In plaintiffs' supplemental response to defendant's motion to alter or amend judgment (document 50), [2/] they call attention to the Tenth Circuit's decision in First Bancorporation v. Board of Governors, 728 F.2d 434 (10th Cir. 1984) filed on February 21, 1984. Defendant has not responded on the merits to plaintiffs' supplemental response.

In First Bancorporation, the Board of Governors of the Federal Reserve System had determined that if plaintiff institution offered NOW accounts and made commercial loans it would be a "bank" under Section 2(c). Plaintiff's industrial loan company, Foothill, offered NOW accounts pursuant to a Utah regulation

which required Foothill to "reserve the right to require thirty days' notice from the account holder before making a withdrawal." Id. at 435. Plaintiff contended that this regulation removed NOW accounts from the ambit of Section 2(c).

The Tenth Circuit agreed with plaintiff's contention and found that because Utah law specifically required the reservation of notice before withdrawal, there was no legal right of withdrawal on demand and so under the plain language of Section 2(c), plaintiff was not a bank. Id. at 436. Plaintiff here now asks this court to apply the Tenth Circuit decision and to declare that NOW accounts are not demand deposits

and to hold that plaintiff may accept NOW accounts and make commercial loans. The court declines to do so for several reasons.

First, the First Bancorporation decision is grounded on a specific regulation in Utah law. The consequences of the decision as it relates to Florida law are not clear; the court's attention has not been directed to a similar provision in Florida law. Secondly, First Bancorporation would only affect, if anything, that portion of the December 13 order which upholds the facial constitutionality of the Florida statute. It does not affect plaintiffs' relief insofar as defendant must process plaintiffs' application as an ISB. The court

feels that the more prudent course is for plaintiffs to present First Bancorporation in the administrative process, or possibly to present the issue as a cross-appeal. Finally, in the initial litigation, this court was presented with a certain set of facts. One of those facts was that plaintiffs did not intend to make commercial loans. Transcript of Preliminary Injunction 29, 33 quoted in plaintiffs' response to Notice of Supplemental Authority Served on March 24, 1982 (document 36). Plaintiffs themselves characterized the determination whether an entity might both accept NOW account deposits and make commercial loans as "academic." Plaintiff's Reply to Court Order Requesting Response to Certain

Questions, document 39 at 4. Given the posture of the case when the order was rendered and the lack of administrative action on the question, the court declines to amend the December 13 order on the basis of the Tenth Circuit decision in First Bancorporation. The interest of judicial economy in resolving this new dispute in its present posture does not outweigh the substantial difficulties in attempting to adjudicate the rights of parties when an issue has not been joined and fully briefed.

DEFENDANT'S SUGGESTION OF MOOTNESS

Even this decision, however, does not end the matter because defendant has filed a "Suggestion of Mootness." Document 54. It is in this document that defendant intimates the view that the court is "holding under advisement but has yet to rule on Plaintiff's Motion for

Summary Judgment and Entry of a Permanent Injunction." Document 54 at 3. The beginning portion of this order should dispel defendant's confusion as to that point. In any event, defendant claims that the passage of House bill 801 on June 16, 1984, providing that no new charters shall be granted for industrial savings banks, makes the December 13 order moot. Plaintiffs replied to defendant's suggestion by claiming that the new statute is unconstitutional and enacted in bad faith.

The obvious problem with defendant's suggestion and plaintiffs' response is that the December 13 order was a final judgment in Case number 81-0944. At this point, the court cannot say that the subsequent actions of the Florida Legislature rendered that judgment moot. The court does not intend to get involved in

this, a political foray. See, Baker v. Carr, 369 U.S. 186 (1962). However, the court feels that the suggestion of mootness should be denied because the issues are "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911).

Accordingly, it is ORDERED:

1. The clerk shall enter final judgment NUNC PRO TUNC granting plaintiffs' Motion for summary judgment and permanent injunction.

2. Defendant's motion to alter or amend judgment (document 43) is DENIED.

3. Defendant's suggestion of mootness (document 54) is DENIED.

DONE and ORDERED this 22nd day of February, 1985.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTES

1/ Plaintiffs also filed a supplemental response to defendant's motion to alter and amend judgment (document 50), which provoked a procedural skirmish. Defendant moved to strike document 50 because it was "clearly an attempt to reconsider matters already raised before the entry of this court's final summary judgment or which should have been raised in plaintiff's original pleadings." Document 51 at 2. Alternatively, defendant asked the court to consider plaintiffs' motion as one to alter and amend and to strike it as untimely. Defendant's motion to strike was denied (document 53), and the court accepted plaintiffs' supplement.

2/ As pointed out earlier, defendant objected to this supplemental response. It is true that the document seems to be more in the nature of a motion to alter or amend; however, this court is not bound by the labels parties affix to their memoranda. Smith v. United States Parole Comm'n, 721 F.2d 346 (11th Cir. 1983). However, it does not follow that the document is therefore untimely filed. The 10-day limitation in Rule 59 is jurisdictional; that is, had neither party acted within ten days, this court would not have had jurisdiction to entertain document 50. However, defendant's timely motion

tolls the time for appeal and preserves this court's jurisdiction so the court may review plaintiffs' supplemental response on the merits. Alternatively, document 50 could be considered a motion under Rule 60(b). It has been held that a motion to reconsider filed within the time period allowed for giving notice of appeal should be granted especially when an intervening appellate precedent would make appeal wasteful. See, D.C. Federation of Civic Associations v. Volpe, 520 F.2d 451, 453 (D.C. Cir. 1975) (permitting intervening appellate decisions to be raised within time for appeal under Rule 60(b); "it is obviously sound administration for litigants to provide the District Courts with the opportunity to correct 'errors' of this sort, and to spare this court unnecessary appeals"). Oliver v. Home Indemnity Co., 470 F.2d 329, 330-331 (5th Cir. 1972) (construing Rule 60 to allow reconsideration when recent decisions have changed the law; "absent the chance of serious injury to the rights of any party, the possible saving of judicial energies warrants the use of such a discretionary reconsideration by the district court"). Since the December 13 order was based in part on the Board's determination in First Bancorporation, it is reasonable for this court to reconsider the order in light of the Tenth Circuit's reversal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONTINENTAL ILLINOIS CORPORATION, et al.,	)	Case No. 85-3165, 85-3949
Plaintiffs-Appellees, Cross-Appellants,	)	
vs.	)	
GERALD A. LEWIS, as Comptroller of the State of Florida, etc.,	)	
Defendant-Appellant, Cross-Appellee	)	
CONTINENTAL ILLINOIS CORPORATION, et al.,	)	
Plaintiffs-Appellants,	)	
vs.	)	
GERALD A. LEWIS, as Comptroller of the State of Florida, etc.	)	
Defendant-Appellee.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida, hereby gives notice of appeal to the Supreme Court of the United States from the decision of this Court issued September 22, 1987, and the decision on petition for rehearing issued by this Court of February 26, 1988, holding (i) that this case has not been rendered moot by amendments to the federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50, (ii) that Fla. Stat. § 664.02 is unconstitutional as violating the Commerce Clause, U.S. Const., art. 1, § 8, cl.3, and (iii) that attorneys' fees on appeal should be awarded to the Plaintiffs-Appellees, Cross-Appellants herein.

This appeal is taken pursuant to 28 U.S.C. § 1254(2) and is filed this 18th day of May, 1988.

FLORIDA DEPARTMENT OF BANKING
AND FINANCE

CHARLES L. STUTTS, General Counsel
ALBERT T. GIMBEL, Chief Banking Counsel

/s/
R. MICHAEL UNDERWOOD, Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399-0350
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES were furnished by U.S. Mail to Andrew L. Gordon, Attorney-at-Law, Shutts & Bowen, 1500 Edward Ball Building, 100 Chopin Plaza-Miami Center, Miami, Florida 33131 and by hand delivery to Eric J. Taylor, Assistant Attorney General, Florida Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32399-1050, this 18th day of May, 1988.

/s/
R. MICHAEL UNDERWOOD

MOTION

(2)

RECEIVED
JUL 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1955

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

vs.

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

MOTION OF APPELLEES CONTINENTAL ILLINOIS CORPORATION, ET AL. TO DISMISS OR AFFIRM

BOWMAN BROWN, ESQUIRE
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QUESTIONS PRESENTED

1. Whether the Court of Appeals' determination that this case is not moot should be summarily affirmed despite amendment to the federal Bank Holding Company Act which prohibits Appellees' proposed Florida industrial savings bank ("ISB") from obtaining Federal Deposit Insurance Corporation ("FDIC") insurance because (a) Florida law does not require ISBs to obtain FDIC insurance; (b) the subject application may be amended as a matter of right to delete the intention to apply for FDIC insurance; and (c) regardless of the contents of the original application, the Court of Appeals' decision will permit Appellees to file a new application which deletes any reference to FDIC insurance.

2. Whether the Court of Appeals' determination that Fla. Stat. § 664.02 is unconstitutional under the Commerce Clause should be summarily affirmed because the statute was enacted for the express purpose and effect of continuing unconstitutional conduct in defiance of this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), and in defiance of the decisions of the trial court below.

3. Whether Appellant may now appeal the issue of whether Commerce Clause claims are cognizable under 42 U.S.C. § 1983 so as to permit the award of attorneys' fees under 42 U.S.C. § 1988 when no opposition was made to Appellees' motion to the Court of Appeals for such fees and, in any event, the Court of Appeals did not expressly determine the issue raised by Appellant herein.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Eleventh Circuit:

(1) Gerald A. Lewis, as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida, appellant herein;

(2) Continental Illinois Corporation, William D. Plechaty, Richard H. Hanneman, James P. Johnson, Gail M. Melick and Robert J. Fiddes, appellees herein.

Pursuant to Rule 28.1, Continental Illinois Corporation submits the following list of its parents, subsidiaries and affiliates as of July 20, 1988:

CIC Trading, S.A., Argentina
CI Funding Corporation
Colonial Maritime Inc.
Conill Corporation
Continental Bank International
Continental Bank of Buffalo Grove, N.A.
Continental Bank of Oakbrook Terrace
Continental Bank S.A./N.V., Belgium
Continental Brokerage Services, Inc.
Continental Capital Management Corporation
Continental Consulting Company, Ltd., London
Continental Euroasia Finance Limited, Hong Kong
Continental Futures and Options Corporation
Continental Illinois Acquisition Corporation
Continental Illinois (Asia) Limited, Hong Kong

Continental Illinois Bancorp, Inc.
Continental Illinois Bank of Deerfield, N.A.
Continental Illinois Bank of Western Springs, N.A.
Continental Illinois Bank—South Suburban
Continental Illinois (Cayman) Ltd.
Continental Illinois Commercial Corporation
Continental Illinois Consulting S.A., Madrid
Continental Illinois Corporation Financial Futures
Continental Illinois Energy Development Corporation
Continental Illinois Equity Corporation
Continental Illinois Finanziaria S.P.A., Italy
Continental Illinois Foundation
Continental Illinois Leasing S.A., Madrid
Continental Illinois Limited—London
Continental Illinois National Bank and Trust Company of Chicago
Continental Illinois Nominee Limited, Hong Kong
Continental Illinois Overseas Finance Corporation, N.V.
Continental Illinois Property Corporation No. 1
Continental Illinois Property Corporation No. 2
Continental Illinois Property Corporation No. 3
Continental Illinois Securities Limited, Hong Kong
*Continental Illinois Sellas Banco de Investimento S.A., Brazil
Continental Illinois Sellas Distribuidora de Titulos e Valores Mobiliarios S.A., Brazil
Continental Illinois Service Corporation
Continental Illinois Services S.A., Madrid
Continental Illinois Services Ltda., Brazil
Continental Illinois Trust Company of Florida, N.A.
Continental Illinois Trust Company of Sarasota, N.A.
Continental Illinois Venture Corporation
Continental International Finance Corporation

Continental International Finance Corporation, Ltda., Chile
Continental International Finance Corporation, Ltda., No. 2 Chile
Continental International Finance S.A., Luxembourg
Cumbria Shipping Company Limited
First Options of Chicago, Inc.
First Options of Chicago Ltd., London
Geone Corporation
Great Lakes Life Insurance Company
Henderson Market Center, Inc.
LaSalle Holdings Ltd., Canada
Liner Holdings (U.S.), Inc.
Mellutus B.V.
P & S Limited Partnership
Securities Settlement Corporation
Societe Anonyme Financiere D'Administration et de Gestion, Belgium
*Tanner S.A. Administradora de Fondos Mutuos, Chile
*Tanner Y Compania S.A. Corredores de Bolsa, Chile

*Not a wholly-owned subsidiary of Continental Illinois Corporation.

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12 U.S.C. § 1841(c)(1) (as amended by Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987))

12 U.S.C. § 1813(h)

12 U.S.C. § 1842(d)

12 U.S.C. § 1846 (as amended by Pub. L. No. 100-86, § 101(f), 101 Stat. 563 (1987))

28 U.S.C. § 1927

42 U.S.C. § 1983

42 U.S.C. § 1988

12 C.F.R. § 225.25

Fla. Stat. § 658.29(1) (1980)

Fla. Stat. § 664.02 (1987), as amended by 1982 Fla. Laws ch. 82-214, § 27 and by 1984 Fla. Laws, ch. 84-216, § 34

Fla. Stat. § 664.03(14), recodified as Fla. Stat. § 664.03(13), now codified as Fla. Stat. § 664.03(3)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS—(Continued)

Fla. Stat. § 664.03(10)

FLA. ADMIN. CODE § 3C-9.002(6)

The texts of the provisions set forth above are set out in full in the appendix included herein.

PREFACE

In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court attempted to conclude eight years of unconstitutional discrimination against out-of-state bank holding companies ("BHCs") by declaring pertinent portions of Fla. Stat. § 659.141(1) unconstitutional. This Court's effort proved unsuccessful. The Florida Legislature responded to *BT Investment Managers, Inc.* by reenacting the statute virtually verbatim as Fla. Stat. § 658.29(1) (1980), and extending its scope to prohibit out-of-state BHCs from owning Florida industrial savings banks ("ISBs"). Fla. Stat. § 664.03(14), recodified as Fla. Stat. § 664.03(13), *now codified as* Fla. Stat. § 664.03(3). As shown by this appeal, appellant Gerald Lewis, as Comptroller of the State of Florida and Head of the Department of Banking and Finance (the "Department"), also persisted in his attempts to enforce the unconstitutional prohibitions.

The instant action arose when the Department refused to accept an application by the appellees (collectively referred to as "Continental Illinois") to establish a Florida ISB as a wholly owned subsidiary of appellee Continental Illinois Corporation ("CICorp"). The refusal was solely predicated on CICorp's status as an out-of-state BHC. The trial court entered final summary judgment for Continental Illinois finding Fla. Stat. § 664.03(3) unconstitutional. The trial court's judgment, with modifications, was affirmed by the United States Court of Appeals for the Eleventh Circuit

(the "Court of Appeals" or "court below").[1] The Court of Appeals' decision is squarely predicated on this Court's unanimous opinion in *BT Investment Managers, Inc.* This appeal does not present any other questions of substance which are properly framed for review. Thus, for the reasons stated below, Continental Illinois respectfully submits that this appeal should be dismissed or the decision of the Court of Appeals should be summarily affirmed.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

The historical background to this appeal begins with the enactment of the 1970 amendments to § 4(c)(8) of the Bank Holding Company Act of 1956 (the "BHC Act"). 12 U.S.C. § 1843(c)(8). In pertinent part, the 1970 amendments authorized BHCs to engage in such nonbanking activities as were determined by order or regulation of the Board of Governors of the Federal Reserve System (the "Board") to be "so closely related to banking . . . as to be a proper incident thereto." The Board exercised this authority and by regulation provided that BHCs could acquire or control certain types of nonbanking subsidiaries (referred to herein as "§ 4(c)(8) subsidiaries") including, *inter alia*, trust companies, investment advisory services and ISBs. 12 C.F.R. § 225.25 (b)(2)-(4).[2]

Under the Douglas Amendment to the BHC Act, a BHC may acquire a "bank" subsidiary only in the state of the BHC's principal banking operations unless specifically authorized by the laws of the state in which the to-be-acquired "bank" is located. 12 U.S.C. § 1842(d). This geographical restriction thus prevents a BHC from owning a "bank" in more than one state unless permitted by state law. The BHC Act does not contain any geographical restriction on BHC ownership of § 4(c)(8) subsidiaries. The litigation below thus primarily focused on the Department's contention that a Florida ISB subsidiary of a BHC is a "bank" subject to the Douglas Amendment rather than a § 4(c)(8) subsidiary.

Until the August 10, 1987 effective date of the Competitive Equality Banking Act of 1987 ("CEBA"), § 2(c) of the BHC Act defined a "bank" as an entity which both accepted demand deposits and engaged in the business of commercial lending. CEBA, in pertinent part and subject to certain exceptions, amended § 2(c) to provide that any entity that accepts deposits which are insured by the Federal Deposit Insurance Corporation ("FDIC") also is a "bank" under the BHC Act. 12 U.S.C. § 1841(c)(1) (as amended by Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987)).

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[1] The trial court's decision is unreported but is set forth in the Appendix to the Department's Jurisdictional Statement ("J.S.") at App. 37a-69a. The Court of Appeals' decision is reported at 827 F. 2d 1517 and 838 F.2d 457 and is set forth at J.S. App. 1a-36a.

[2] This statutory background is summarized in *BT Investment Managers, Inc. v. Lewis*, 461 F. Supp. 1187, 1191-92 (N.D. Fla. 1978) (3 judge court), *aff'd in relevant part*, 447 U.S. 27 (1980).

The Board's original regulation of BHC ownership of ISBs as permissible § 4(c)(8) subsidiaries reflected this statutory scheme by providing that a BHC could own an ISB subsidiary so long as the ISB did not "both accept demand deposits and make commercial loans." J.S. at App. 42a. This regulation subsequently was amended to its present form to simply provide that a BHC can own an ISB provided the ISB is not a "bank." 12 C.F.R. § 225.25(b)(2). Under the federal regulatory scheme, it is thus impossible for a BHC to own an ISB as a § 4(c)(8) subsidiary in violation of the Douglas Amendment.

Under Florida law, an ISB is prohibited from accepting demand deposits but is permitted to accept negotiable order of withdrawal ("NOW") account deposits.[3] Fla. Stat. § 664.08(1). Florida ISBs are permitted but not required to make commercial loans, Fla. Stat. §§ 664.07 and 664.08, and are permitted but not required to obtain FDIC insurance. Fla. Stat. § 664.03(10). Prior to the effective date of CEBA, a Florida ISB was incapable of being deemed a "bank" under the BHC Act because it could not accept demand deposits. After CEBA, a Florida ISB could obtain FDIC insurance and be deemed a "bank" but in such circumstances could not be acquired by a BHC as a § 4(c)(8) subsidiary.

B. HISTORICAL BACKGROUND

In 1972, Bankers Trust New York Corporation ("Bankers Trust"), a New York BHC, announced its

[3]NOW account deposits are not demand deposits. *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

intention to establish a Florida chartered entity which would provide investment advisory services. The Florida Legislature responded by prohibiting any out-of-state BHC from owning or controlling a Florida subsidiary which provided investment advisory services to banks. 1972 Fla. Laws, ch. 72-96, § 1; Fla. Stat. § 659.141(1) (1972). Bankers Trust then filed an application with the Board to establish and operate a Florida chartered investment advisory subsidiary which would provide services to entities other than banks. In response, the Florida Legislature in a 1972 special session amended § 659.141(1) to flatly prohibit out-of-state BHCs from owning or controlling any Florida investment advisory service or trust company. 1972 Fla. Laws, ch. 72-726, §§ 1-7. *BT Investment Managers, Inc. v. Lewis*, 461 F. Supp. at 1191-93.

In the subsequent litigation, District Judge Stafford, for a unanimous three-judge court, in pertinent part declared Fla. Stat. § 659.141(1) to be facially unconstitutional under the Commerce Clause. *BT Investment Managers, Inc.*, 461 F. Supp. 1187. The three-judge court subsequently denied the Department's motion to stay its ruling.[4] Based on the pendency of the appeal to this Court, however, the Department continued to deny applications by out-of-state BHCs. In the resulting litigation, Judge Stafford again held Fla. Stat. § 659.141(1) to be unconstitutional.[5]

[4]Order dated June 19, 1979. This unreported Order and the other unreported Orders discussed herein appear in the record below as exhibits to Continental Illinois' Motion for Summary Judgment and Entry of a Permanent Injunction and Supporting Memorandum of Law dated November 18, 1981.

[5]*McElroy v. Lewis*, Case No. 80-76 (N.D. Fla. Dec. 11, 1980).

During the pendency of the Bankers Trust appeal to this Court, the Department apparently advised this Court that Florida intended to reenact Fla. Stat. § 659.141(1) in order to avoid mooting the appeal. 447 U.S. at 53 n.15. This Court rendered its decision in *BT Investment Managers, Inc.* on June 9, 1980. In pertinent part, this Court found Florida's prohibitions against out-of-state BHC ownership of § 4(c)(8) subsidiaries to be unconstitutional under the Commerce Clause.

In July 1980, a special session of the Florida Legislature reenacted Fla. Stat. § 659.141(1) virtually verbatim as Fla. Stat. § 658.29(1). On remand from this Court, Judge Stafford for the three-judge court again held Florida's prohibitions against ownership of § 4(c)(8) subsidiaries by out-of-state BHCs to be unconstitutional under the Commerce Clause.[6] In conjunction with the passage of Fla. Stat. § 658.29(1), the Florida Legislature also extended its unconstitutional prohibitions to the ownership of Florida ISBs by out-of-state BHCs. Fla. Stat. § 664.03(3).[7]

C. THE LITIGATION BELOW

In June 1981, CICorp, a Delaware corporation with its principal place of business in Illinois, applied to the Department for a charter to establish a Florida ISB as a wholly-owned subsidiary of CICorp. The Department

[6]Order dated March 11, 1981.

[7]Fla. Stat. § 664.03(3) was originally codified at § 664.03(14) and was subsequently recodified at § 664.03(13). The present statutory number is used herein.

did not read the application or otherwise review its contents except to the extent required to determine that the application was made by an out-of-state BHC.[8] The Department then denied the application as legally precluded pursuant to Fla. Stat. § 658.29(1), as made applicable to ISBs by Fla. Stat. § 664.03(3).

Continental Illinois filed the instant action in August 1981 seeking to declare Fla. Stat. §§ 658.29(1) and 664.03(3) to be unconstitutional, to enjoin further enforcement of the challenged statutes and to require the Department to process the subject application. District Judge Stafford subsequently granted Continental Illinois' motion for a preliminary injunction to require the immediate processing of the application.

The Florida Legislature then amended Fla. Stat. § 664.02 to impose a moratorium on the further issuance of ISB charters by the Department. *See* 1982 Fla. Laws ch. 82–214, § 27, Fla. Stat. § 664.02(2) (1982 Supp.). The District Court found the moratorium to have been imposed "[i]n response to" the entry of the preliminary injunction.[9] After expiration of the moratorium, the District Court entered summary judgment finding Fla. Stat. § 664.03(3) to be facially constitutional but

[8]Transcript of August 31, 1981 Hearing on Preliminary Injunction at 42-43.

[9]J.S. at App. 39a.

unconstitutional as applied under the Commerce Clause.[10]

The entry of summary judgment triggered responses by both the Florida Legislature and the Department. In an admitted attempt to continue to discriminate against CICorp and other out-of-state BHCs, the Florida Legislature again amended Fla. Stat. § 664.02 to flatly prohibit the further issuance of ISB charters. 1984 Fla. Laws, ch. 84–216, § 34. The legislative history to this amendment to Fla. Stat. § 664.02 in pertinent part provides:

> Sections 34 and 35 of the bill were included in the bill because of growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking. Two years ago, the legislature imposed a one-year moratorium on the issuance of new ISB charters pending the outcome of litigation over the application of Continental Illinois Corporation to establish ISBs in Florida. A federal court in Florida has now ruled in favor of Continental Illinois, and in the wake of that decision both Citicorp and BankAmerica Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.
>
> Accordingly, . . . Section 34 of the bill prohibits the issuance of any new industrial savings bank charters . . . .[11]

The Department responded to the summary judgment with a F.R.C.P. 59 motion to alter or amend judgment. The Department claimed that certain previously undisclosed incipient agency policy—a purported requirement that Florida ISBs were required to both make commercial loans and accept NOW deposits—independently required the rejection of the subject application. The Department accordingly urged that the summary judgment was "premature" pending the development of an administrative record. This motion later was followed by a motion to dismiss for mootness after the Florida Legislature amended Fla. Stat. § 664.02 as described above.

Continental Illinois responded to the Rule 59 motion by asserting that the purported agency policy had been manufactured in bad faith and by noting that the Department did not have authority to require an applicant as a condition of licensure to engage in

[10]J.S. at App. 37a. The finding of facial constitutionality was predicated on a then extant Board ruling finding NOW account deposits to be a form of demand deposits, a ruling which led the trial court to find that a Florida ISB could be a "bank" under the BHC Act. *See First Bancorporation v. Board of Governors of Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984), *rev'g*, 68 Fed. Res. Bull. 253 (1982). The subsequent reversal of *First Bancorporation* by the Tenth Circuit was the basis for Continental Illinois' cross-appeal below.

[11]Florida House of Representatives Committee on Commerce, Bill Analysis of HB 801, at 2–3, May 31, 1984.

activities which were discretionary under Florida law. Continental Illinois' factual contentions were based on the Department's failure to reveal this purported agency policy despite specific request from the District Court for briefing of this issue and on deposition testimony in a related proceeding which revealed that the then director of the Department's Division of Banking had no independent knowledge regarding the existence of the alleged agency policy.

Continental Illinois responded to the motion to dismiss for mootness by challenging the validity of Fla. Stat. § 664.02 on constitutional and state law grounds and contending that an invalid statute could not form the basis for dismissal. Continental Illinois asserted that the statute was invalid under the Commerce and Due Process Clauses and, in the circumstances of this case, would not be retroactively applied to the pending application under state law. Despite express invitation, the Department did not respond on the merits to these assertions. After the Tenth Circuit reversed the Board's decision in *First Bancorporation, see* footnote 10 *supra,* Continental Illinois also filed a supplemental brief suggesting reconsideration of the portion of the summary judgment which relied on the Board's decision.

The District Court disposed of these motions in a Final Judgment *Nunc Pro Tunc* dated February 22, 1985.[12] The District Court denied the F.R.C.P. 59 motion because the Department had failed to raise the issue despite specific inquiry from the court and on the merits

[12]J.S. at App. 51a.

because the purported agency policy improperly required ISBs to engage in activities which were discretionary under Florida law. In the apparent belief that the Florida Legislature could enact unconstitutional legislation more quickly than such legislation could be voided by the courts, the District Court also denied the motion to dismiss for mootness under the "capable of repetition yet evading review" doctrine. Finally, the District Court refused to reconsider its ruling as to the status of NOW account deposits and suggested that Continental Illinois raise this issue in the administrative process or by cross-appeal.

Continental Illinois then moved for the award of its reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 or as sanctions pursuant to F.R.C.P. 11, 28 U.S.C. § 1927 or inherent court power. The District Court denied this motion without explanation.[13]

The Department appealed and Continental Illinois cross-appealed the trial court's judgment on the merits, raising essentially the same arguments previously urged before the trial court. Continental Illinois additionally appealed from the denial of its attorneys' fees. The Department appealed both the finding that Fla. Stat. § 664.03(3) was unconstitutional as applied to out-of-state BHCs and the refusal to dismiss the case as moot. Continental Illinois cross-appealed the finding that Fla. Stat. §§ 658.29(1) and 664.03(3) in conjunction were facially constitutional and additionally sought to have Fla. Stat. § 664.02(3) determined to be

[13]Order dated November 7, 1985.

unconstitutional under the Commerce or Due Process Clause or to be inapplicable to the pending application under state law.

In September 1987, the Court of Appeals issued its decision holding Fla. Stat. §§ 658.29(1) and 664.03(3) in conjunction to be unconstitutional under the Commerce Clause. In the appeal herein, the Department expressly does not challenge this finding and accordingly does not dispute that the processing of the subject application has been unconstitutionally delayed since July 1981.[14]

The Court of Appeals additionally found Fla. Stat. § 664.02 to be unconstitutional based both on its avowed purpose as expressed by the legislative history and on its discriminatory effects. Relying on *BT Investment Managers, Inc.*, the Court of Appeals rejected the contention that congressional authorization for state discrimination against ownership of "banks" by out-of-state BHCs be deemed to authorize such discrimination against § 4(c)(8) subsidiaries. Finally, the Court of Appeals remanded to the trial court for an explanation for the basis for its denial of attorneys' fees.

The Department then moved for rehearing on two grounds. The Department asserted that the CEBA amendments expanding the BHC Act definition of "bank" to include entities with deposits insured by the FDIC mooted the appeal because the subject application indicated an intention to apply for FDIC insurance. The Department also asserted that the Court of Appeals

[14]J.S. at 7.

decision was in conflict with this Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

The Court of Appeals denied the motion for rehearing in a decision dated February 26, 1988. In the same opinion, the Court of Appeals granted previously filed motions by Continental Illinois for the award of appellate attorneys' fees and for the clarification of the prior panel opinion to make clear that the trial court was authorized to award attorneys' fees on remand if deemed appropriate.[15]

ARGUMENT

I.

THE AMENDMENT OF THE BHC ACT DEFINITION OF "BANK" TO INCLUDE FDIC INSURED ENTITIES DOES NOT MOOT THIS APPEAL BECAUSE ISBs ARE NOT REQUIRED TO OBTAIN FDIC INSURANCE UNDER FLORIDA LAW.

The Department's primary argument is that this case is moot as a result of CEBA's amendment to the BHC Act definition of "bank" to include entities with FDIC insurance. The Department apparently contends that the subject application irrevocably commits Continental Illinois to apply for FDIC insurance for the proposed ISB and that the only relief requested in this action concerns the processing of this purportedly fatally

[15]J.S. at App. 31a.

defective application. Both contentions miscite the record below and applicable law and are simply without substance.

The Department's position is based on a statement in the subject application that "[a]ll deposit relationships will be insured to the maximum extent allowed by the Federal Deposit Insurance Corporation."[16] As a consequence of the CEBA amendments, the "maximum extent allowed" at this time is no insurance. The Department nonetheless assumes that Continental Illinois will apply for, and the FDIC will grant, an application for such insurance with knowledge that the insured entity would consequently become illegal. There is no record support for this assumption.

There further is no legal basis for the Department's assumption that Continental Illinois is required to apply for FDIC insurance as a result of statements in the original application. Under applicable Florida regulation, an applicant for an ISB charter may amend its application "as a matter of course" at any time within thirty days after the application is received for filing. FLA. ADMIN. CODE § 3C-9.002(6) (1983). During appropriate administrative proceedings, Continental Illinois therefore can amend its application as a matter of right to delete any reference to FDIC insurance. As the Department acknowledged when it requested the Court of Appeals to dismiss this appeal for mootness, "Florida law does not and has never required ISBs to maintain FDIC insurance as a condition for accepting

[16]J.S. at 1-2.

deposits."[17] There accordingly is no factual predicate for the Department's apparent contention that Continental Illinois is required to file a fatally defective application.

This case would not be moot even if the subject application had indicated an irrevocable intention to apply for FDIC insurance for the proposed ISB. Continental Illinois has requested declaratory relief finding the challenged statutes to be unconstitutional, injunctive relief restraining their continued enforcement and injunctive relief requiring the Department to process the subject application. The CEBA amendments would only moot the portion of the Court of Appeals decision which requires the processing of the original application. The declaratory relief finding the challenged statutes unconstitutional continues to present a live controversy because such relief is a necessary predicate to the filing of a new application by any out-of-state BHC, including CICorp. *See Lewis v. BT Investment Managers, Inc.* 447 U.S. at 35 n.5.

This case was filed because the Department unconstitutionally refused to process an application by an out-of-state BHC. At that time, the Department was indifferent to the contents of the application or the creation of an administrative record.[18] In the succeeding seven years of litigation, the Department has seized every opportunity to further protract these proceedings.

[17]Suggestion of Gerald A. Lewis For Rehearing *En Banc* at 8.

[18]J.S. App. at 59a.

The Department now does not dispute that its original refusal to process the subject application violated the United States Constitution. In these circumstances, the Department's claim that remand is required for further factual development is without merit and clearly does not present any substantial issue worthy of consideration by this Court.

II.

THE COURT OF APPEALS' DECISION THAT FLA. STAT. § 664.02 IS UNCONSTITUTIONAL SHOULD BE SUMMARILY AFFIRMED.

The Court of Appeals' decision that Fla. Stat. § 664.02 is unconstitutional is squarely predicated on prior decisions of this Court. The decision relies on historical background, the existence of discriminatory effects and an avowed discriminatory purpose—criteria which have been regularly employed by this Court in a century of Commerce Clause jurisprudence. The decision further is based on an uncontradicted record demonstrating intentional unconstitutional misconduct with such clarity as to make it manifest that further briefing and argument are unnecessary.

In *BT Investment Managers, Inc.*, the Department and parochial banking interests as *amicus curiae* for eight years defended Florida's misconduct on the basis that banking was not part of interstate commerce and that the Douglas Amendment or local regulatory power under § 7 of the BHC Act, 12 U.S.C. § 1846, authorized state discrimination against nonbanking subsidiaries

of out-of-state BHCs. This Court's contrary decision was greeted with brazen defiance. Further orders by the trial court triggered further unconstitutional enactments. It is difficult to conceive of more telling evidence of discriminatory intent. *Compare Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977) (finding evidence of protectionist intent in historical background) *with Maine v. Taylor*, 106 S. Ct. 2440, 2453-55 (1986) (finding insufficient evidence of protectionist intent). The statute's discriminatory purpose accordingly provides a sufficient basis for the summary affirmance of the Court of Appeals' decision. *E.g., Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270-74 (1984); *see Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 229-31 (1964).

The Department's contradictory contentions in this appeal provide further evidence of its refusal to obey constitutional constraints. Its assertion that Fla. Stat. § 664.02 has "*de minimus* impact on interstate commerce" provides a curious contrast to its insistence that applications for ISB charters by out-of-state BHCs "threaten[ ] subversion of Florida's regional banking statute. . . ." J.S. 38, 40. The claim that the discrimination resulting from Fla. Stat. § 664.02 is caused by federal law (J.S. 31) is simply repetition of its prior assertion in *BT Investment Managers, Inc.* that the Douglas Amendment authorizes state discrimination against § 4(c)(8) subsidiaries.

This Court has held repeatedly that the Commerce Clause requires the courts to undertake their own independent inquiry into the practical impact of the challenged statute. *E.g., Hughes v. Oklahoma*, 441 U.S.

322, 336 (1979). The Court of Appeals followed this precedent and correctly determined that artful drafting did not obscure the fact that the statute, if valid, would preclude entry into the market for Florida deposits by out-of-state BHCs. The Board, as the primary federal regulator, has reached similar factual conclusions regarding the discriminatory effect of Florida's related prohibitions against § 4(c)(8) subsidiaries pursuant to Fla. Stat. § 658.296.[19] The Department has failed to assert any substantial basis to challenge these findings. The record herein thus provides such overwhelming evidence of both discriminatory purpose and intent as to render unnecessary further review by this Court.

III.

THE AWARD OF APPELLATE ATTORNEYS' FEES BY THE COURT OF APPEALS PRESENTS NO SUBSTANTIAL ISSUES FOR REVIEW.

As an abstract issue, Continental Illinois agrees that the question of whether the Commerce Clause creates "rights, privileges, or immunities secured by the Constitution" within the meaning of 42 U.S.C. § 1983 may present a question of great national importance. Indeed, the Department, by failing to cite the appellate decisions which have recognized that Commerce Clause

[19] *Chemical New York Corporation*, 73 Fed. Res. Bull. 609 (1987), *appeal pending, Lewis v. Federal Reserve Board*, Case No. 87-3455 (11th Cir.).

claims are cognizable under 42 U.S.C. § 1983, minimizes the existing conflict among the circuits.[20]

The record here, however, is clearly inappropriate for the resolution of this issue. Continental Illinois moved for the award of its appellate attorneys' fees by motion dated October 9, 1987. The Department did not file any response or otherwise oppose this motion. Ordinary principles of appellate review thus preclude the Department from raising this issue as to the award of appellate attorneys' fees. *E.g., United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 368 & n.10 (D.C. Cir. 1981).

Even assuming that the Department's briefing of this issue as to the denial of attorneys' fees by the trial court is a sufficient record basis for plenary review of the award of appellate fees at this time, the Court of Appeals' decision does not provide a sufficient basis for review of the issue raised by the Department. Continental Illinois moved for the award of its attorneys' fees from the trial court pursuant to F.R.C.P. 11, 28 U.S.C. § 1927 and 42 U.S.C. § 1988. The grounds raised in its appeal from the trial court on the attorneys' fee issue were expressly incorporated into the motion for appellate attorneys' fees. The motion for § 1988 fees was further predicated not only on Continental Illinois' success in its Commerce Clause challenge but also on the "reasonable" relationship between those successful claims and the claims made under the Fourteenth

[20] *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980).

Amendment which were not reached by the trial court. *See Smith v. Robinson*, 468 U.S. 992, 1007 n.10 (1984).

The Court of Appeals did not explain its reasons for the award of attorneys' fees. The Department's assumption that fees were not awarded as sanctions and instead were awarded pursuant to § 1988 does not exclude the possibility that they were awarded because the Commerce Clause claims were "reasonably related" to the claims made under the Due Process Clause.

It clearly is unnecessary for this Court to undertake an independent review of the record to determine whether the Court of Appeals did or could have appropriately awarded attorneys' fees as sanctions. It similarly appears unnecessary for this Court to undertake plenary review to determine whether the Court of Appeals did or could have correctly applied the *Smith v. Robinson* reasonable relationship standards as the basis for such award. The record here accordingly does not provide this Court with an adequate basis to determine the issues raised by the Department with regard to the award of attorneys' fees under 42 U.S.C. § 1988 for violations of the Commerce Clause.

CONCLUSION

For the reasons stated above, this appeal should be dismissed or the decision of the Court of Appeals summarily affirmed.

Respectfully submitted,

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Dated: July 27, 1988.

Appendix

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. CONST. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

12 U.S.C. § 1841(c)(1) (as amended by Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987)):

> (1) IN GENERAL.—Except as provided in paragraph (2), the term "bank" means any of the following:
>
> (A) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act [12 U.S.C. § 1813(h)].
>
> (B) An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which both—
>
> (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and
>
> (ii) is engaged in the business of making commercial loans.

12 U.S.C. § 1813(h):

> (h) The term "insured bank" means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this Act; and the term "noninsured bank" means any bank the deposits of which are not so insured.

12 U.S.C. § 1842(d):

> Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823(f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1846 (as amended by Pub. L. No. 100-86, § 101(f), 101 Stat. 563 (1987)):

> No provision of this Act shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

(As amended Sept. 12, 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156).

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

12 C.F.R. § 225.25:

(b)(2) *Industrial banking.* Operating an industrial bank, Morris Plan bank, or industrial loan company, as authorized under state law, so long as the institution is not a bank.

(3) *Trust company functions.* Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law, so long as the institution is not a bank and does not make loans or investments or accept deposits other than:

(i) Deposits that are generated from trust funds not currently invested and that are properly secured to the extent required by law;

(ii) Deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property; or for such owner or investor as agent or custodian of funds held for investment or as escrow agent; or for an issuer of, or broker or dealer in securities, in a capacity such as a paying agent, dividend disbursing agent, or securities clearing agent; provided such deposits are not employed by or for the account of the customer in the manner of a general purpose checking account or interest-bearing account; or

(iii) Making call loans to securities dealers or purchasing money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances. (Such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company).

(4) *Investment or financial advice.* Acting as investment or financial adviser to the extent of:

(i) Serving as the advisory company for a mortgage or a real estate investment trust;

(ii) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(20), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(iii) Providing portfolio investment advice [footnote omitted] to any other person;

(iv) Furnishing general economic information and advice, general economic statistical forecasting services and industry studies [footnote omitted]; and

(v) Providing financial advice to state and local governments, such as with respect to the issuance of their securities.

Fla. Stat. § 658.29 (1980):

(1) Except as provided in subsection (3), no bank, trust company, or bank holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all, or substantially all, of the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where

or from which it furnished investment advisory services in this state. However, if a bank, trust company, or bank holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after December 20, 1972, the effective date of former s. 659.141(1), as amended, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from December 20, 1972, the effective date of former s. 659.141(1), as amended, or from the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend the 2-year period from time to time if it determines that any such extension would not be detrimental to the public interest; but any such extension shall not exceed 1 year, and all extensions shall not in the aggregate exceed 3 years.

Fla. Stat. § 664.02(1):

> (1) The charters of industrial savings banks existing at the time of the adoption of this chapter shall continue in full force and effect, but no new charter may be granted for an industrial savings bank.

Fla. Stat. § 664.03(14), recodified as Fla. Stat. § 664.03(13), now codified as Fla. Stat. § 664.03(3):

> The following sections are applicable to industrial savings banks operating under this Chapter:
>
> (3) Section 658.29, relating to prohibited ownership and control.

Fla. Stat. § 664.03(10):

> The following sections are applicable to industrial savings banks operating under this Chapter:
>
> (10) Section 658.38, relating to deposit insurance and membership in the Federal Reserve System.

FLA. ADMIN. CODE § 3C-9.002. Application.

> (6) Amendment of Application. An applicant may amend the application as to those factors generally within the control or selection of the applicant once, as a matter of course, at any time within 30 days from its receipt for filing. Otherwise, the application may only be amended with permission from the department. A merger agreement may be amended at any time prior to its approval by the stockholders of the constituent financial institutions or decision by the department, whichever occurs first. Requests to make material changes filed at any time after the application has been received may be deemed by the department to be grounds for denial, and a new application accompanied by the appropriate filing fee may be required. Material changes may include, but are not limited to, changes in the composition of the board of directors, officers, or stockholders of the institution; location of the proposed license action; and fixed asset proposal. If the department grants a request to make material changes in the application, the amended application will be treated as a new application with respect to the applicable Rules of Chapter 3C-9, F.A.C., except that no filing fee shall be required. When an application is denied on the grounds set forth above, the applicant shall be duly notified.

REPLY

BRIEF

No. 87-1955

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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S. Rep. No. 19, 100th Cong., 1st Sess. 7 (1987), reprinted in 1987 U.S. Code Cong. & Ad. News (No. 8) 489. 7

INTRODUCTORY STATEMENT

In their Motion to Dismiss or Affirm, the Appellees (hereinafter collectively referred to as "Continental Illinois") devote relatively little space to the substantive issues raised by the Appellant. Instead, Continental Illinois spends most of its effort in mounting a misguided and unfounded attack on Florida's good faith.

Continental Illinois repeatedly tries to link this case with Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980). While alleging that BT Investment arose out of "eight years of unconstitu-

tional discrimination" by Florida,[1] Continental Illinois ignores the fact that BT Investment raised important issues of first impression concerning the interaction between the Commerce Clause and the state authority over bank holding companies recognized under Sections 3(d) and 7 of the Bank Holding Company Act of 1956, ("BHC Act"), 12 U.S.C. §§ 1842(d) and 1846. A decision by this Court was needed to resolve those issues,[2] an outcome that

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1 Motion of Continental Illinois to Dismiss or Affirm ("Cont. Ill. Br.") at 1. See also id. at 4-6, 16.

2 BT Investment 447 U.S. at 44-49. The "verbatim" reenactment of the statute so emphasized by Continental Illinois (Cont. Ill. Br. 1, 6) prevented the remanded proceed-

hardly reflects adversely on Florida's good faith in enacting and then defending its statute against legal challenge.

Similarly, Continental Illinois assails Florida's good faith in adopting a 1980 statute to prohibit the acquisition of Florida ISBs by out-of-state bank holding companies.[3] Continental Illinois' challenge to that statute, however, presented legal questions that were entirely

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ings from being moot and, in any event, is irrelevant to this case.

3 1980 Fla. Laws Ch. 80-255, § 12, codified as Fla. Stat. § 664.03(14), later recodified as Fla. Stat. § 664.03(13), now codified as Fla. Stat. § 664.03(3). The current statutory designation is used herein.

different from those settled in BT Investment. BT Investment considered the application of former Fla. Stat. § 659.141 to an investment advisory subsidiary which was not chartered as a bank and provided no deposit-taking or lending services. In contrast, Continental Illinois' challenge to Fla. Stat. § 664.03(3) presented the issue of whether a chartered banking institution, such as an ISB, which would engage in deposit-taking and lending activities, would be a "bank" for purposes of Section 3(d) of the BHC Act (popularly known as the "Douglas Amendment").[4] If Section 3(d) had

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4 See 827 F.2d at 1523, Juris. St. App. 24a-28a; Cont. Ill. Br. 3.

been as clearly applicable to Florida ISBs before 1987 as it is now, Fla. Stat. § 664.03(3) would have been immune from Continental Illinois' Commerce Clause challenge.[5]

Continental Illinois now asserts that Appellant Lewis "admitted" that Florida acted "unconstitutionally . . . since July 1981"[6] by failing to appeal the Court of Appeals' decision invalidating Fla. Stat. § 664.03(3). On the contrary, the record demonstrates that Appellant Lewis consistently and in good faith defended the constitutionality

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5 Northeast Bancorp v. Bd. of Governors, 472 U.S. 159, 174-75 (1985).

6 Cont. Ill. Br. 8, 12.

of Fla. Stat. § 664.03(3) until the Court of Appeals resolved the question in accordance with this Court's orders in the parallel U.S. Trust litigation.[7] Florida's good faith position as to the Douglas Amendment's application to deposit-taking ISBs and other "nonbank banks" is confirmed by the fact that (i) Florida was at first

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7 Fla. Dept. of Banking and Finance v. Bd. of Governors, 760 F.2d 1135 (11th Cir. 1985), vacated and remanded sub nom. U.S. Trust Corp. v. Bd. of Governors, 474 U.S. 1098 (1986), on remand, 800 F.2d 1534 (11th Cir. 1986), cert. denied sub nom. Conference of State Bank Supervisors v. Bd. of Governors, 107 S.Ct. 1887 (1987). This Court's orders in the U.S. Trust litigation followed its earlier decision in Bd. of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986).

successful before the Court of Appeals in the U.S. Trust litigation and (ii) under the Competitive Equality Banking Act of 1987 ("CEBA"), Congress expanded the definition of "bank" because it agreed with Florida that the "nonbank bank loophole" had resulted in the "circumvent[ion]" of the Douglas Amendment and, thereby, or state laws regulating the interstate acquisition of banks.[8]

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8 S. Rep. No. 19, 100th Cong. 1st Sess. 7 (1987), reprinted in 1987 U.S. Code Cong. & Ad. News (No 8) 489, 497. See Act of Aug. 10, 1987, Pub. L. No. 100-86, § 101, 101 Stat. 552, 554 codified at 12 U.S.C. § 1841(c). As a result of CEBA, Fla. Stat. § 664.03(3) is no longer of great significance because the Douglas Amendment now bars the acquisition of FDIC-insured ISBs by out-of-state bank holding companies.

ARGUMENT

I. BASED ON THE ADMISSIONS OF CONTINENTAL ILLINOIS, THERE CAN BE NO QUESTION BUT THAT THIS CASE HAS BECOME MOOT.

Continental Illinois acknowledges that, by reason of CEBA's amendment to the definition of "bank" under Section 2(c) of the BHC Act, 12 U.S.C. § 1841(c), the Douglas Amendment now bars Continental Illinois from establishing an FDIC-insured ISB in Florida. Continental Illinois further admits that its original application contemplated the establishment of such an insured ISB.[9] These admissions demonstrate that this case is moot unless Con-

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9 Cont. Ill. Br. 4, 14.

tinental Illinois now intends to apply for an uninsured ISB. Continental Illinois, however, has given no indication that it actually intends to make such an application.[10]

Continental Illinois instead contends that, even if it does not intend to establish an uninsured ISB, this case is still not moot because other bank holding companies outside the Southeastern region might wish to apply to operate uninsured ISBs in Florida (Cont. Ill. Br. 15). This contention is

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10 Continental Illinois has asserted that it " can amend its application as a matter of right to delete any reference to FDIC insurance." (Cont. Ill. Br. 14; emphasis added). However, Continental Illinois has made no statement of any actual intent to do so.

disposed of by Hall v. Beals, 396 U.S. 45 (1969). In Hall, this Court dismissed, on mootness grounds, a constitutional challenge to a Colorado statute imposing a residency requirement for voters, because the appellants were no longer barred by the law from voting. This Court held that the appellants could not seek to resurrect their challenge on the ground that other prospective voters might be affected by the law. 396 U.S. at 48-49.[11]

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11 BT Investment, 447 U.S. at 35 n.5, does not support this part of Continental Illinois' argument. (Cont. Ill. Br. 15.) In BT Investment, Bankers Trust's challenge to former Fla. Stat. § 659.141(1) was held not to be moot, despite a Florida administrative ruling allowing Bankers Trust to operate a single "grandfathered"

II. CONTINENTAL ILLINOIS HAS FAILED TO JUSTIFY THE COURT OF APPEALS' INVALIDATION OF FLA. STAT. § 664.02 UNDER THE COMMERCE CLAUSE.

In its discussion of the Commerce Clause issue, Continental Illinois fails to rebut or even address the fundamental point raised by the Appellant -- namely, that the Court of Appeals' invalidation of Fla. Stat. § 664.02 constitutes an unprecedented interference with

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office, because Bankers Trust intended to open additional Florida offices which would be subject to Fla. Stat. § 659.141(1). See 447 U.S. at 30, 35 n.5. Here, in contrast, Continental Illinois has proposed only to open an insured ISB, which is now barred by the Douglas Amendment. Under these circumstances, BT Investment actually confirms that this case is moot. 447 U.S. at 51-53.

Florida's evenhanded exercise of its chartering authority over banking institutions and other corporations.[12] The Court of Appeals' decision is inconsistent with this Court's recent admonition in CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987), that courts must recognize the "significance for Commerce Clause analysis" of the fact that corporations are "entities whose very existence and attributes are a product of state law."[13] Yet Continental Illinois has nowhere considered the relevance of CTS Corp. to this case.

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12 Juris. St. 22-28.
13 107 S.Ct. at 1649.

Alleging "avowed discriminatory purposes" and "discriminatory effects" of the statute,[14] Continental Illinois quotes the same passage from the legislative history that was relied on by the Court of Appeals.[15] When read in context, however, this passage demonstrates that the intent of Fla. Stat. § 664.02 was to preserve the integrity of Florida's regional banking statute and thereby to ensure an orderly, pro-competitive transition from single-state to interstate banking. In order to accomplish this legitimate state objective, Florida chose the evenhanded and

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14 Cont. Ill. Br. 16.
15 Id. at 8-9; 827 F.2d at 1521,

constitutional approach of prohibiting the award of any further ISB charters to any in-state or out-of-state person.[16]

Juris. St. App. 16a-17a.

16 Juris. St. 33-39. Continental Illinois has cited only one case -- Hunt v. Washington State Apple Advisory Commission, 432 U.S. 333 (1977) -- in which this Court struck down a facially neutral state statute under the Commerce Clause. However, like Best v. Maxwell, 311 U.S. 454 (1940), relied on by the Court of Appeals (see Juris. St. 44-46), Hunt is entirely distinguishable from this case.

The North Carolina law invalidated in Hunt prohibited shipment into or within North Carolina of apples packed in containers bearing state inspection grades. This law had a direct and substantial impact on business activity in other states. As this Court noted, the law would have required Washington apple growers either to stop showing Washington state inspection grades on their containers or to pack apples destined for North Carolina in special unmarked packages. 432

Concerning the alleged "discriminatory effects" of Fla. Stat. § 664.02, Continental Illinois does not dispute that it and other out-of-state bank holding companies are able, notwithstanding Fla. Stat. § 664.02, to provide a large volume of banking-related services in Florida. Thus Fla. Stat. § 664.02

U.S. at 337-38. Moreover, the North Carolina statute could not even be found to further the asserted state objective of protecting consumers, since it permitted apples to be sold in containers bearing no information as to inspection grades. Id. at 353.

In contrast, Fla. Stat. § 664.02 deals only with the chartering of Florida ISBs and does not interfere with business operations in any other states. Furthermore, this measure is reasonably designed to advance Florida's legitimate interest of accomplishing an orderly transition to interstate banking.

does not impose an undue burden on interstate commerce.[17]

---

17 Juris. St. 40-47. Continental Illinois asserts that Appellant Lewis has presented inconsistent arguments in contending that Fla. Stat. § 664.02 was legitimately designed to prevent the "threatened subversion" of Florida's regional banking statute but nevertheless has only a " de minimus impact on interstate commerce." Cont. Ill. Br. 13, quoting Juris. St. 38, 40. The alleged inconsistency is an invention of Continental Illinois. As shown by the U.S. Trust litigation and the enactment of CEBA (see Juris. St. 36-38), the threatened subversion of Florida's regional statute was real and substantial. On the other hand, an evenhanded state statute, like Fla. Stat. § 664.02, can be held to place a constitutionally insignificant burden on interstate commerce despite the fact that it hinders or even bars particular out-of-state suppliers. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978) (the Commerce Clause "protects the interstate market, not

III. THE COURT OF APPEALS' AWARD OF ATTORNEYS' FEES TO CONTINENTAL ILLINOIS CAN ONLY BE PURSUANT TO 42 U.S.C. § 1988 AND IS APPROPRIATE FOR REVIEW.

Continental Illinois opposes review of its attorneys' fee award by claiming that the issue was not adequately briefed in the Court of Appeals.[18] While the Court of Appeals did not state the reason for its award of attorneys' fees, the record shows that the Court decided, against unanimous contra authority,[19] that Continental

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particular interstate firms, . . ."). Accord, CTS Corp., 107 S.Ct. at 1649, 1652.

18 Cont. Ill. Br. 19.

19 As stated in Lewis' Jurisdictional Statement, every court that ever considered whether dormant Commerce Clause claims are cognizable under 42 U.S.C. § 1983 is now in conflict with the Eleventh

Illinois' Commerce Clause claim was cognizable under federal civil rights laws and that attorneys' fees were therefore authorized by 42 U.S.C. § 1988. That the Court of Appeals did not make its award on grounds other than 42 U.S.C. § 1988 is clear from the record.[20] This

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Circuit. Juris. St. 48. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) and Kennecott Corp. v. Smith, 637 F.2d 181 (3rd Cir. 1980), cited by Continental Illinois, involved civil rights complaints containing some Commerce Clause claims, however these cases do not address the scope of 42 U.S.C. § 1983.

20 There is nothing in the record to support Continental Illinois' suggestion that the attorneys' fee award was a sanction. Similarly, the argument that its Commerce Clause claim was "reasonably related" to Fourteenth Amendment claims merely begs the question of whether Commerce Clause claims are cognizable under 42 U.S.C. § 1983.

question was the subject of all the briefs in one of the consolidated appeals (Case No. 85-3949) and the parties' positions on the question were, therefore, well known to the Court of Appeals. The Court should now resolve this issue, it having been exhaustively briefed both in the District Court and again on appeal.[21]

Continental Illinois acknowledges, as it must, that whether

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21 The fact that this issue was fully briefed on appeal obviously distinguishes this case from United States v. Estate of Donnelly, 397 U.S. 286 (1970) and GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364 (D.C. Cir. 1981), cited by Continental Illinois as "[o]rdinary principles of appellate review" allegedly precluding review of this case. Cont. Ill. Br. 19.

attorneys' fees may be awarded under 42 U.S.C. § 1988 for violation of the Commerce Clause is "a question of great national importance."[22] The Court is urged to resolve the conflict between the Circuits created by the Eleventh Circuit's decision on this substantial federal question.

Respectfully submitted,

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DATED: September 30, 1988.

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22 Cont. Ill. Br. 18.

AMICUS CURIAE

BRIEF

(4)

Supreme Court, U.S.
FILED
MAY 18 1989
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No. 87-1955

In the Supreme Court of the United States

OCTOBER TERM, 1988

GERALD A. LEWIS, APPELLANT

v.

CONTINENTAL BANK CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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27 pp

QUESTIONS PRESENTED

1. Whether appellees' Commerce Clause challenge to Florida's refusal to approve an application to establish a state-chartered industrial savings bank no longer creates a justiciable case or controversy, where federal law has been changed to eliminate any Commerce Clause objection to state discrimination against the only activity that appellees have expressed any intention of undertaking.

2. Whether Florida's across-the-board prohibition on the chartering of industrial savings banks violates the Commerce Clause.

3. Whether a claim under the Commerce Clause may be brought under 42 U.S.C. 1983 and, hence, may be a basis for attorney's fees under 42 U.S.C. 1988.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1955

GERALD A. LEWIS, APPELLANT

v.

CONTINENTAL BANK CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Under the Douglas Amendment to the Bank Holding Company Act (BHCA), 12 U.S.C. 1842(d), a bank holding company with its principal banking operations in one State may not establish a bank in another State unless the latter State's statutes specifically authorize it do so. That license for state discrimination against out-of-state bank holding companies applies, however, only if the proposed banking subsidiary is a "bank" within the meaning of the BHCA, 12 U.S.C. 1841(c). A financial institution outside the BHCA definition—a so-called "nonbank bank"—is outside the scope of the Douglas Amendment, and state regulation of such institutions is therefore subject to the Commerce Clause's restrictions on state discrimination. See *Board of Governors, FRS* v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986); *Northeast Bancorp, Inc.* v. *Board of Governors,*

FRS, 472 U.S. 159 (1985); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

When this case arose, the BHCA definition of "bank" excluded institutions that either did not accept demand deposits or were not engaged in the business of commercial lending. See 12 U.S.C. 1841(c). That "loophole" in the federal definition encompassed industrial savings banks (ISBs) under Florida law. When the Florida legislature attempted to close the loophole by prospectively abolishing the ISB form of financial institution in Florida, the court of appeals held the attempt invalid under the Commerce Clause.

In 1987, however, while the case was pending in the court of appeals, the BHCA definition of "bank"—and hence the scope of the Douglas Amendment's authorization of state discrimination—was broadened to include, inter alia, all institutions whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-86, § 101(a), 101 Stat. 554-557. The proposed ISB that gave rise to this case was to be FDIC-insured, and hence by the BHCA amendment became subject to Douglas Amendment-authorized discrimination by Florida after 1987. The court of appeals nevertheless declined to consider whether this case still presented a live Commerce Clause controversy.

In this Court, appellant, who is the head of the Florida Department of Banking and Finance, contends that the case has been rendered moot by Congress's 1987 action to expand the definition of "bank." J.S. 11-19. Appellant also challenges the ruling that Florida's ban on new ISB charters is invalid under the Commerce Clause. J.S. 20-47. In addition, appellant challenges the court of appeals' award of attorney's fees to appellees for their successful appeal. J.S. 47-51.

1. On June 29, 1981, appellee Continental Bank Corporation, a bank holding company with its principal place of business in Illinois, along with five other individuals who are also appellees (collectively Continental), filed an application with the Florida Department of Banking and Finance to establish and operate an ISB in Miami, Florida. J.S. 1. The application stated that the proposed ISB would accept deposits from individuals into negotiable order of withdrawal (NOW) accounts, savings accounts, and certificate of deposit accounts and would make home mortgage and consumer loans. The application further stated that "[a]ll deposit relationships" would be insured "to the maximum extent allowed by the Federal Deposit Insurance Corporation." J.S. 1-2.

Appellant rejected Continental's application, citing Fla. Stat. § 658.29(1) (1984), as made applicable to ISBs by Fla. Stat. § 664.03(3) (1984). Those provisions make it unlawful for any out-of-state bank holding company to "acquire, retain, or own, directly or indirectly, all, or substantially all, of the assets of, or control over," a Florida ISB (§ 658.29(1)). Continental thereupon brought suit, challenging the Florida ban on out-of-state ISBs as unconstitutional.[1]

2. The district court granted summary judgment for Continental. It held that the Florida ban on out-of-state ownership of ISBs, as applied to Continental, violates the Commerce Clause. The court enjoined enforcement of the statute and ordered appellant to process Continental's application. J.S. App. 47a-48a.

Appellant moved to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). While the motion was pending, Florida amended its statute to prohibit the chartering of any new ISBs. See Fla. Stat. § 664.02(1) (1984 & Supp. 1989).[2] Appellant

[1] Both of the provisions relied on by appellant were enacted by the Florida legislature in July 1980. The previous month, this Court had held unconstitutional under the Commerce Clause a Florida statute insofar as it prohibited out-of-state bank holding companies from offering investment advisory services in Florida, Fla. Stat. § 659.141 (1984). *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). Section 658.29(1) is in all pertinent respects identical to the invalidated Section 659.141. See J.S. App. 5a-6a.

[2] In 1982, after the district court had issued a preliminary injunction in the present case, the Florida legislature imposed a temporary moratorium on the issuance of ISB charters. Fla. Stat. § 664.02(2) (Supp. 1982). The district court issued its summary judgment ruling after the expiration of the moratorium in 1983. The Florida legislature shortly thereafter enacted its ban on new ISB charters. See Mot. to Aff. 7-8.

thereupon argued that the case had become moot, because appellant's office was now prohibited from issuing any new ISB charters, whether to Continental or to any other bank holding company. The district court rejected appellant's contention, explaining that final judgment had been rendered prior to the statutory amendment and that the issues were "capable of repetition, yet evading review." J.S. App. 65a-66a. On the other hand, the district court denied Continental's motion for an award of attorney's fees. See J.S. App. 11a.

3. The court of appeals affirmed the judgment of the district court, with one exception. J.S. App. 1a-30a. It first agreed with the district court that the blanket ban on new ISB charters in Section 664.02 did not moot the case. Unlike the district court, however, the court of appeals reached the question of Section 664.02's validity under the Commerce Clause, explaining that Florida's ban on ISB charters, if valid, "precludes effective relief and moots the case." J.S. App. 11a. The court of appeals held that the ban violates the Commerce Clause. J.S. App. 11a-24a.

The court observed that the Florida statute is "facially neutral between in-state and out-of-state commerce in its absolute prohibition against the establishment of additional Florida ISBs." J.S. App. 12a. Nevertheless, the court reasoned, that fact does not end the Commerce Clause inquiry. Even a facially neutral statute is invalid under the Commerce Clause, the court ruled, if, in its practical operation, it has a discriminatory, protectionist effect on interstate commerce and it lacks a valid local purpose. J.S. App. 12a-16a.

Here, the court of appeals concluded, the law at issue lacks a valid local purpose and is protectionist in purpose and effect. The court found that the ISB ban's "avowed purpose," as expressed in its legislative history, "is to protect Florida banks from competition by financial institutions owned by out-of-state holding companies." J.S. App. 17a. The court also concluded that the effect of the statute is "to erect an insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies." *Id.* at 20a. The court explained (*ibid.*) that, "[w]hile in-state bank holding companies are also

precluded from establishing ISBs, they have the alternative of establishing traditional banks and thereby gaining access to Florida deposits."[3] That is not an option for out-of-state bank holding companies like Continental because the Douglas Amendment to the BHCA, 12 U.S.C. 1842(d), expressly permits States to bar out-of-state bank holding companies from establishing a "bank," and Florida has effectively done so. Hence, as a practical matter, the burden of the Florida ISB ban falls exclusively on out-of-state banking institutions, for they have no other means of entering the market for Florida deposits. In sum, the court of appeals found a Commerce Clause violation because "the practical effect of § 664.02 and its stated purpose [are] the protection of in-state banking from competition by financial institutions owned by out-of-state bank holding companies." J.S. App. 23a-24a.

Having ruled that Florida's blanket ISB prohibition was no barrier to relief, the court held that the original ban on the acquisition of ISBs by out-of-state bank holding companies, Fla. Stat. §§ 658.29, 664.03 (1984), violates the Commerce Clause. J.S. App. 24a-28a. The court acknowledged that the Douglas Amendment, 12 U.S.C. 1842(d), would permit Florida to prohibit out-of-state bank holding companies from acquiring a state-chartered institution that is a "bank" within the meaning of the federal BHCA, 12 U.S.C. 1841(c). J.S. App. 25a. The court held, however, that ISBs do not qualify as "banks" within the meaning of the Douglas Amendment and the BHCA, because they do not accept "demand deposit[s]." J.S. App. 26a-27a. Accordingly, federal law does not authorize Florida's discrimination against out-of-state bank holding companies with respect to ISBs. Relying on *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), in which this Court invalidated

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[3] In fact, the court pointed out that an in-state bank holding company would not normally choose to establish an ISB, because ISBs have "limited functions" under state law. J.S. App. 20a-21a. For example, a Florida ISB, unlike a full-service bank, is prohibited from carrying "commercial or demand banking accounts" other than NOW accounts (Fla. Stat. § 664.08(1) (1984)) and from accepting trusts or acting as "guardian, administrator, or judicial trustee in any form" (Fla. Stat. § 664.08(5)).

Florida's overt prohibition against out-of-state bank holding company ownership of investment advisory companies, the court concluded that Florida's prohibition of the acquisition of ISBs by out-of-state bank holding companies violates the Commerce Clause. J.S. App. 27a-28a.

Finally, the court of appeals remanded the attorney's fees issues to the district court. J.S. App. 30a. The court observed that Continental had sought fees under 42 U.S.C. 1988 and also invoked the district court's power to award fees for bad faith litigation. J.S. App. 29a. The court of appeals concluded that the district court should provide an explanation for its denial of fees. *Id.* at 30a.

4. Shortly before the court of appeals issued its opinion, Congress amended the BHCA definition of "bank" to include all institutions whose deposits are insured by the FDIC. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 554-557 (to be codified at 12 U.S.C. 1841(c)(1)(A)).[4] Appellant thereupon filed a petition for rehearing, arguing that the new legislation mooted the controversy because the ISB that Continental proposed to establish would have FDIC-insured deposits and therefore would be a "bank" covered by the Douglas Amendment. Such coverage would mean that Florida's prohibition against Continental's establishment of its proposed ISB would be authorized by federal law and, hence, immune from challenge under the Commerce Clause.

In response, the court of appeals "clarifi[ed]" its prior opinion but declined to alter its conclusion that the Florida statutes are unconstitutional. J.S. App. 32a. Although it acknowledged that the BHCA amendments "significantly altered the definition of a

[4] The amendments also loosened the requirement that a "bank" accept "demand deposits." Under the new definition, an institution that is engaged in the business of commercial lending is a "bank" within the meaning of the BHCA if it either accepts demand deposits or "deposits that the depositor may withdraw by check or similar means for payment to third parties or others." Alternatively, an institution is a "bank" within the meaning of the BHCA if its accounts are insured by the FDIC, whatever its activities. See J.S. xvi (quoting new definition).

'bank' " (J.S. App. 34a), the court rejected the suggestion of mootness, stating that it could not say that the amendments would make Continental's operation of a Florida ISB a "banking" activity "in every instance," because it could not "guess what the parties will do or not do as a result of the enactment of the * * * amendments" (*id.* at 33a-34a). In addition, the court clarified that its remand on the attorney's fees question permitted the district court to award fees if appropriate. *Id.* at 35a. Finally, the court granted Continental's motion for attorney's fees on appeal and remanded for the district court to determine the appropriate amount. *Id.* at 36a.

DISCUSSION

It appears that there is no longer a live case or controversy between the parties. As a result of the 1987 BHCA amendments, Continental has no live Commerce Clause challenge to the ISB ban unless it has plans to pursue an ISB application without FDIC insurance. Because Continental apparently has no such plans, the case appears to be moot, and the Court should vacate the judgment below on that ground.

If the Court disagrees with that view, then the Commerce Clause and attorney's fees issues deserve plenary review. As to the former, the Florida ban plainly has a protectionist purpose, and its effect is discriminatory if viewed, not in terms of ISBs alone (as to which the ban is evenhanded), but in terms of the entire Florida market for deposits (as to which only in-state bank holding companies apparently have alternative means of entry). Whether that approach to judging discriminatory effect is correct, as well as the significance here of States' traditional broad authority over State-created corporations (see *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 89-94 (1987)), would profit from plenary examination by this Court.

The attorney's fees question would likewise warrant inclusion in an order setting the case for full briefing and argument. The courts of appeals are divided on the question whether a claim under the Commerce Clause may be brought under 42 U.S.C. 1983 and, hence, may be the basis for an award of attorney's fees

under 42 U.S.C. 1988. Moreover, mootness aside, there is no impediment to this Court's consideration of the question.

1. The court of appeals appeared to recognize that the 1987 change in the BHCA definition of "bank" may have mooted this case, but it refused to consider the issue, explaining that it would not "guess what the parties will do or not do" as a result of the 1987 amendments. J.S. App. 34a. If the case is moot, however, the court of appeals was deprived of jurisdiction, and consideration of the merits was improper. *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 73 (1983). In *Honig* v. *Doe*, 108 S. Ct. 592, 601 (1988), this Court recently explained (citations omitted): "Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." See also *Deakins* v. *Monaghan*, 108 S. Ct. 523, 528 (1988). No lesser requirements of a continuing, live controversy applies in the court of appeals—especially where, as here, the events casting doubt on whether the case remains alive occurred prior to the court of appeals' decision. Accordingly, this Court must address the question of mootness, as the court of appeals should have done, prior to reaching the merits and, if necessary, must remand the case for a determination of mootness. See *Allee* v. *Medrano*, 416 U.S. 802, 818-820 (1974); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972).

As the record in this case now stands, it appears that when the BHCA was amended in 1987, the case "lost its character as a present, live controversy of the kind that must exist if [the courts] are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).[5] Continental may not challenge the ban on new ISB charters to the extent that ban

[5] Because "[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision" (*St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608 (1987)), once the 1987 change in the BHCA took effect, the Article III question had to be addressed in light of that change.

is authorized by the Douglas Amendment, for "state actions which [Congress] plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc.* v. *Board of Governors, FRS*, 472 U.S. at 174; see *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 434-436 (1946). For Continental to have a live Commerce Clause challenge, therefore, it must propose to charter an ISB that is outside the newly broadened scope of the Douglas Amendment. Yet, despite having had ample opportunity to do so, Continental has not indicated any intention of proposing such an ISB.

The Douglas Amendment, 12 U.S.C. 1842(d), prohibits a bank holding company such as Continental from establishing a "bank" in Florida without Florida's express permission; and Florida, far from granting such permission; has expressly denied it. Fla Stat. §§ 658.29(1), 664.03(3) (1984). As applied to any "bank" within the meaning of the BHCA (12 U.S.C. 1841(c)), the Florida prohibition is immune from Commerce Clause attack. Prior to 1987, Continental's proposed ISB would not have been a "bank" for purposes of the Douglas Amendment because it did not meet either of the two requirements of the federal definition: as proposed, the ISB was not to "accept[] deposits that the depositor has a legal right to withdraw on demand," and it was not "to engage[] in the business of making commercial loans" (12 U.S.C. 1841(c)).[6] As a result of the 1987 BHCA amendments, however, the Douglas Amendment covers any Florida ISB whose deposits are insured by the FDIC, and Florida may validly ban the acquisition of any such ISB by Continental.

It follows that Continental is not subject to the Florida ISB ban unless it proposes to establish an ISB without FDIC insur-

[6] Under Florida law, an ISB could not carry "commercial or demand banking accounts" other than NOW accounts. Fla. Stat. § 664.08(1) (1984). NOW accounts are not deposits "that the depositor has the legal right to withdraw on demand" within the meaning of 12 U.S.C. 1841(c). See *Board of Governors, FRS* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). Hence, Florida ISBs were not "banks" under the pre-1987 BHCA. Under the 1987 BHCA amendment, the federal definition covers commercial lending institutions that accept NOW accounts. See note 4, *supra*.

ance (and that is not otherwise a "bank" under 12 U.S.C. 1841(c)). Yet there is at present no indication that Continental has any such plans. Continental's original application stated that "[a]ll deposit relationships" of its proposed ISB would be insured "to the maximum extent allowed by the Federal Deposit Insurance Corporation." J.S. 1-2. Since the enactment of the 1987 amendments, Continental has not amended its application or filed a new application. Moreover, in this Court and in the court of appeals, Continental has carefully avoided making any representation that it has plans to propose an ISB without FDIC insurance; it has merely observed that it is possible for it to take such steps. See Mot. to Aff. 13-16; Continental Illinois Response to Lewis Suggestion for Rehearing En Banc 3-4. That mere possibility creates only a hypothetical controversy, which is not sufficient for Article III purposes.

In these circumstances, it appears that Continental is not any longer "within the class of persons who will be concretely affected" (*Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982)) by the Florida ISB ban insofar as it can be challenged under the Commerce Clause.[7] As the Court has pointed out in the related context of ripeness, plaintiffs do not have a live controversy unless, "but for the sanctions of the * * * provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision." *Clements* v. *Fashing*, 457 U.S. 957, 962 (1982). Here, Continental has not alleged that it plans to undertake the only activity that would subject it to the Florida ISB ban in a manner that is outside the shelter of the BHCA and, hence, that is open to challenge under the Commerce Clause. Cf. *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 51 (doubting that case or controversy exists with respect to validity of statute where plaintiff has not sought to perform services within the coverage of the statute). See also *Frank* v. *Minnesota Newspaper Ass'n, Inc.*, No. 87-1956 (Apr. 25, 1989)

[7] There is no state insurance program for deposits of Florida ISBs, and it is open to substantial doubt whether Continental would even attempt to establish an ISB whose depositors could not be assured that their money would be insured.

(case moot where plaintiff withdrew objection to statute); *Deakins* v. *Monaghan*, 108 S. Ct. at 528 (case moot where plaintiffs withdrew claims).

In sum, without a clear expression by Continental that it has definite intentions to apply for a non-FDIC-insured ISB charter, there is no case or controversy. If the Court is satisfied that Continental has had a sufficient opportunity to express such an intention, it should vacate the court of appeals' decision and remand with instructions that the case be dismissed. Otherwise, the Court should vacate the decision below and remand with instructions that further proceedings be conducted, in the court of appeals or the district court, to determine whether Continental intends to engage in the conduct that would keep the case alive.[8]

2. If the Court disagrees with our view that there is, at a minimum, a serious mootness problem, the court of appeals' determination that Florida's ban on the further chartering of ISBs violates the Commerce Clause would warrant plenary review.[9] In *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1280, 1282 (1989), this Court recently summarized the familiar standards governing the Commerce Clause's limitations on state power "to erect barriers against interstate trade" (*Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 35):

> We have applied a "virtually *per se* rule of invalidity" against state laws that amount to "simple economic protectionism," *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978), and have found such protectionism when a state law "directly regulates or discriminates against interstate

[8] Of course, if there is no longer a live controversy, Continental has no claim to attorney's fees under 42 U.S.C. 1988, because it no longer is a "prevailing party." See *Rhodes* v. *Stewart*, 109 S. Ct. 202 (1988); *Hewitt* v. *Helms*, 482 U.S. 755 (1987).

[9] Appellant does not contest in this Court the court of appeals' holding that the Florida statutes prohibiting the acquisition of an ISB by an out-of-state bank holding company, Fla. Stat. §§ 658.29 and 664.03 (1984), are invalid.

> commerce, or when its effect is to favor in-state economic interests over out-of-state interests," *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 579 (1986). * * *
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> * * * * *
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> Even if not *per se* unconstitutional, a state law may violate the Commerce Clause if it fails to pass muster under the balancing test outlined in *Pike* v. *Bruce Church, Inc.*[397 U.S. 137 (1970).] Provided the challenged law "regulates evenhandedly to effectuate a legitimate local public interest," however, "and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S., at 142.

The Court's decisions applying those standards establish that the protection of the Commerce Clause is not limited to discrimination that appears on the face of the challenged state measure.[10] The Court has also several times stated that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citations omitted); see *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).[11] In

[10] See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977). In *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455, 457 (1940) (footnote omitted), the Court observed that "[t]he commerce clause forbids discrimination, whether forthright or ingenious" and that it forbids "legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." In *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 37, the Court stated that "[t]he principal focus on inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." See also, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) (state tax held unconstitutionally discriminatory despite absence of facial discrimination).

[11] It has been suggested that the Court's decisions on Commerce Clause challenges to state regulatory measures are best read as turning ultimately on an inquiry into protectionist purpose. See Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1092 (1986).

addition, the Court's decisions uniformly recognize that a state measure, to survive a Commerce Clause challenge, must be supported, at a minimum, by a valid non-protectionist local interest. See, *e.g.*, *New Energy Co.* v. *Limbach*, 108 S. Ct. 1803, 1810 (1988); *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. at 89-94; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. at 473; *Lewis*, 447 U.S. at 35-36; *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977).

The Florida statute at issue in this case plainly had a protectionist purpose, in that it was "designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.* v. *Limbach*, 108 S. Ct. at 1807. It is essentially undisputed that the Florida ban on the chartering of ISBs was enacted in direct response to the district court's decison invalidating the Florida ban on the acquisition of ISBs by out-of-state bank holding companies. The summary of the legislation prepared by the staff of the Florida House of Representatives expressly states that the ban on ISBs was proposed "because of growing concern over the use of industrial savings banks to circumvent restrictions of interstate banking." J.S. App. 16a. The summary continues (*id.* at 16a-17a):

> "A federal court in Florida has now ruled in favor of Continental Illinois, and in the wake of that decision both Citicorp and BankAmerican [*sic*] Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.
>
> "Accordingly, except for a temporary charter issued to facilitate a cross-industry conversion, merger, or acquisition, section 34 of the bill prohibits the issuance of any new

industrial savings banks charters thus limiting the number of ISBs to the three that currently exist."

The court of appeals was accordingly correct in concluding that the "avowed purpose" of Florida's ban on the chartering of ISBs was to "protect Florida banks from competition by financial institutions owned by out-of-state holding companies." *Id.* at 17a.

Indeed, in acknowledging that the purpose of the Florida ISB ban was to "protect the integrity of Florida's regional banking statute" (J.S. 35), appellant effectively concedes that the ban was enacted to protect in-state depository institutions against their out-of-state competitors, because Florida's regional banking statute is an express restriction on interstate banking.[12] As previously discussed, state protectionism with regard to "banks" as defined under the BHCA is expressly authorized by the Douglas Amendment. *Northeast Bancorp Inc.* v. *Board of Governors, FRS*, 472 U.S. at 174. This case, however, involves the application of Florida's ban on ISB charters to a request to establish an ISB that (insofar as the case is not moot) is *not* covered by the Douglas Amendment. The protectionist aim of the statute involved in this case, therefore, is not federally authorized and is not a legitimate local purpose.[13]

The Florida ISB ban likewise appears to have a discriminatory effect on interstate commerce, despite the fact that, on its face, it applies evenhandedly to both in-state and out-of-state entities proposing to establish ISBs. The court of appeals stated that, "regardless of the statute's facial neutrality," the effect of the Florida ban was to erect an "insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies," because such companies have no alternative means of gaining access to that market, while in-state bank holding companies can "gain[] access to Florida deposits" through "the alternative of establishing traditional banks." J.S. App. 20a. Appellant, far from contesting the critical finding that the ISB ban effectively operates against a background prohibition on other deposit-taking activity by out-of-state bank holding companies, has all but conceded its correctness. See J.S. 30-31; *id.* at 40-44 (describing financial business that out-of-state bank holding companies may conduct in Florida, omitting any suggestion that deposit-taking is among them).[14] The practical effect of the Florida ISB measure, therefore, would seem to be concededly discriminatory.[15]

The foregoing conclusions—perhaps either one of them alone—would seem sufficient to render the Florida ISB ban unconstitutional under this Court's decisions.[16] Nevertheless, there

[12] Fla. Stat. § 658.295 (1984) provides that only bank holding companies from certain states in the Southeast may acquire full-service banks in Florida.

[13] For that reason, it appears that the Florida ISB ban would be invalid even under the *Pike* v. *Bruce Church* aspect of Commerce Clause doctrine, because Florida cannot prevail if there is no legitimate local purpose behind the law.

[14] The closing of alternative means of entering the deposit-taking market appears to be partly the result of other Florida provisions, Fla. Stat. § 658.296(1)-(3) (1984 & Supp. 1989), that prohibit an out-of-state (non-regional) bank holding company from establishing any FDIC-insured institution in Florida. As a result of the 1987 BHCA amendments, the prohibition would now seem to be valid under the Douglas Amendment. The prohibition was found unconstitutional by the Federal Reserve Board prior to the enactment of the 1987 amendments to the BHCA with respect to institutions that were not banks under the pre-amendment BHCA. *Chemical New York Corp.*, 73 Fed. Res. Bull. 609 (1987), appeal pending *sub nom. Lewis* v. *Board of Governors, FRS*, No. 87-3455 (11th Cir.).

Appellant has not suggested that, at least since the 1987 amendments, Continental has, as a technical legal matter or as a practical matter, any means of establishing a Florida deposit-taking financial institution, such as a Florida "bank" that is not a "bank" for BHCA purposes.

[15] The court of appeals observed that "in-state bank holding companies would normally choose to establish a bank, with all its attendant rights, as opposed to an ISB, which has limited functions." J.S. App. 20a-21a. That observation draws support from the fact that there were three, but only three, in-state ISBs in existence at the time the ban on new ISB charters was enacted. See *id.* at 17a. But the conclusion that the Florida ban discriminates against interstate commerce does not depend on the correctness of that observation. It is enough that in-state bank holding companies have the readily available option of forming non-ISB deposit-taking institutions, whereas out-of-state bank holding companies do not.

[16] With respect to both protectionist purpose and discriminatory effect, *Exxon Corp.* v. *Maryland*, 437 U.S. 117 (1978), and *CTS Corp.*, *supra*, are distinguishable from the present case. In *Exxon Corp.*, the aim of the state

are two aspects of this case that have not been fully addressed in this Court's decisions. Along with the attorney's fees question, which itself would merit plenary review, those aspects of the Commerce Clause issue in this case—although not, apparently, of importance to other cases—would usefully be given plenary consideration.

First, the apparently discriminatory effect of the ISB ban is produced, not by the ban alone, but in conjunction with the Douglas Amendment's valid authorization of discrimination regarding *banks*. The court of appeals concluded that ISBs and banks were actually part of the same relevant market (deposit-taking institutions); in determining that the ban discriminated, the court therefore evaluated the effect of the ban not only on ISBs (the sole subject of the facially evenhanded statute) but also on the remainder of what it determined to be the actual market. Although the court of appeals' view of the practical real-market effect of the measure, together with the evidence of discriminatory purpose, suggests under this Court's decisions that the Florida law produces an invalid discrimination against interstate commerce, the court's reliance on an examination of markets broader than those described by the terms of the

statute was to protect certain in-state purchasers (gasoline retailers) from their suppliers, not to protect in-state suppliers complaining about competing out-of-state suppliers. And because there were no in-state suppliers, the challenged state law also had no discriminatory effect on out-of-state suppliers' ability to compete with in-state competitors. Similarly, the statute at issue in *CTS Corp.* was not designed to protect in-state competitors of the complaining out-of-state tender offerors. And the statute did not have the discriminatory effect of placing a restriction on out-of-state companies' access to an in-state market (tender offerors' access to the market for corporate shares) that did not apply equally to their in-state competitors. (It is for that reason that the principal challenge in *CTS Corp.* was under the *Pike* v. *Bruce Church* component of the Commerce Clause doctrine, rather than under the protectionism component.)

In the present case, although the Florida ISB ban evenhandedly bars all new *ISB* charters, the court of appeals concluded that its analysis could not focus only on ISBs. Rather, it concluded that the broader deposit-taking market was the proper market for purposes of analyzing whether the law had the purpose or effect of protecting in-state competitors of out-of-state bank holding companies. In neither *Exxon Corp.* nor *CTS Corp.* was there any consideration of a broader market than that which the state law described on its face.

challenged state measure presents a question that it would be useful for this Court to address fully.

Second, the effect of the court of appeals' invalidation of the Florida ISB ban is to require Florida to retain the ISB as a form of state-created financial institution for the foreseeable future. This Court in *CTS Corp.*, 481 U.S. at 89, stressed the traditional state power over "entities whose very existence and attributes are a product of state law"; and it may be doubted that Continental would have a valid Commerce Clause challenge if Florida had refused to create the ISB form in the first place—although the effect of such a refusal would be the same as that of Florida's prospective elimination of the ISB form. On the other hand, in *CTS Corp.*, the Court carefully explained (481 U.S. at 89-93) that the state regulation of corporate form at issue was supported by legitimate, nonprotectionist state purposes, which cannot be said in the present case. Moreover, Florida's refusal to charter ISBs is not the equivalent of simple state inaction; it evidently has a regulatory effect, in the context of Florida's other laws, given the prohibition on Continental's entering the deposit-taking market by other means. Also, the court of appeals' ruling does not require perpetual retention of the ISB form; Florida would have a quite different case to make in support of abolishing the ISB form if it had a nonprotectionist purpose for doing so. Full briefing on these considerations would be appropriate.[17]

3. Again if we assume arguendo that there is no mootness problem in this case, the court of appeals' decision to award attorney's fees deserves plenary review, notwithstanding that the

[17] There is an analogy to *Palmer* v. *Thompson*, 403 U.S. 217 (1971), an equal protection case, that is worth exploring. There, this Court upheld a racially motivated but facially evenhanded government closure of public swimming pools to all persons, noting the government's lack of any duty to operate swimming pools. There is no indication, however, that the government itself was supplying alternative pools or interchangeable recreation opportunities for white persons. In the present case, the court of appeals found that in-state companies were provided by the state with access to an alternative, substitute form of financial institution that was denied to out-of-state bank holding companies.

appeals court did not expressly state the basis for its award. The most likely basis for the award was the court's conclusion that Continental's Commerce Clause challenge was properly brought under 42 U.S.C. 1983, a conclusion that, if correct, would mean that the challenge is subject to the attorney's fees authorization of 42 U.S.C. 1988. That conclusion presents a question that warrants this Court's consideration.

State and federal courts have reached conflicting conclusions on the question whether Section 1983 applies to Commerce Clause claims. See *Private Truck Council, Inc.* v. *Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from denial of certiorari). Thus, the Eighth Circuit in *Consolidated Freightways Corp.* v. *Kassel*, 730 F.2d 1139, cert. denied, 469 U.S. 834 (1984), held that a successful Commerce Clause challenge (albeit not a discrimination claim, see *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981)) was not within the coverage of Section 1983, because the Commerce Clause is concerned with state-federal relations rather than individual rights. *Kassel* has been followed by the Tenth Circuit (*J & J Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1476 (1985)) and by the Maine Supreme Court (*Private Truck Council, Inc.* v. *Secretary of State*, 503 A.2d 214, cert. denied, 476 U.S. 1129 (1976)). See also *Connor* v. *Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938) (Commerce Clause claim is not within predecessor to 28 U.S.C. 1343(3), Section 1983's jurisdictional counterpart), aff'd, 305 U.S. 576 (1939).[18] On the other hand, prior to the decision in

[18] The Ninth and Seventh Circuits have relied on *Kassel*'s reasoning in concluding that the Supremacy Clause does not give rise to rights secured by Section 1983 because it allocates powers between the States and the national government. See *White Mountain Apache Tribe* v. *Williams*, 810 F.2d 844, 848-850 (9th Cir. 1987); *Gould, Inc.* v. *Wisconsin Dep't of Industry*, 750 F.2d 608, 616 (7th Cir. 1984), aff'd on other grounds, 475 U.S. 282 (1986). In *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979), this Court held that a claim under the Supremacy Clause does not give rise to a "right, privilege or immunity secured by the Constitution" within the meaning of Section 1983's jurisdictional counterpart, 28 U.S.C. 1343(3).

This Court recently granted the petition for a writ of certiorari on a similar Supremacy Clause question under Section 1983. See *Golden State Transit Corp.* v. *City of Los Angeles*, cert. granted, 109 S. Ct. 1117 (1989) ("Whether

the present case, the Third Circuit held that a Commerce Clause claim was properly brought under Section 1983 and therefore was not barred by the Anti-Injunction Act, 28 U.S.C. 2283. *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 186 n.5 (1980). See also *Martin-Marietta Corp.* v. *Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982) (suit claiming violation of Commerce and Supremacy Clauses not barred by Anti-Injunction Act); *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297 (D. Mont. 1975), aff'd on other grounds, 425 U.S. 463 (1976) (28 U.S.C. 1343(3) covers claim that a state cigarette tax and licensing scheme violates the Commerce Clause).

The Court itself has sent somewhat mixed signals on the general question whether Section 1983, with its seemingly sweeping language, covers only some claims of constitutional violation but not others.[19] Moreover, the volume of Commerce Clause litigation makes the question of Section 1983's coverage, and hence of Section 1988's coverage, an important one. See Mot. to Aff. 18. And proper resolution of the question would require full briefing. Thus, the original understanding of Section 1983's "rights, privileges, and immunities" language, the provision's legislative history, and the evolution of Section 1983 case law would require exploration. See, *e.g.*, *Kassel*, 730 F.2d at 1141-1147; Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827 (1988). So too would the question whether there is any coherent and practically administrable distinction between those constitutional provisions that secure "rights, privileges, [or] immunities" and those

in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983.").

[19] Compare *Carter* v. *Greenhow*, 114 U.S. 317 (1885) (rejecting Section 1983 damages action alleging Contract Clause violation, explaining that the Contract Clause does not grant a direct right against state action alleged to impair a contract but only the right to a judicial declaration that the state law is invalid, which must be sought in a suit to enforce the contract) with *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 549 n.16 (1972) (the " 'rights, privileges, or immunities secured * * * by the Constitution and laws of the United States' " under 28 U.S.C. 1343(3) include rights under "*all* of the Constitution and laws of the United States").

which do not; among other problems, any such distinction would have to account for the fact that many Commerce Clause challenges may equally be stated under the Fourteenth Amendment's due process or equal protection clauses. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984); *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980).

The Court's consideration of the Commerce Clause question under Section 1983 is not precluded by the court of appeals' failure expressly to reject reliance on the three other bases for attorney's fees that were put forth by Continental. It would be appropriate for the Court to consider the Section 1983 question alone, even if the court of appeals could consider potential alternative bases for fees on remand from a decision holding that Section 1983 does not cover Continental's Commerce Clause claim. Moreover, if this Court were to consider the other suggested bases as alternative grounds to support the judgment, two of those bases are readily dismissable, and the Commerce Clause ground would appropriately be considered before addressing the third.

Thus, the contention that Florida's conduct "multiplie[d] the proceedings" on appeal "unreasonably and vexatiously," 28 U.S.C. 1927, is not and could not be supported by any appellate court findings. The second asserted basis for fees—that Continental's Commerce Clause victory was reasonably related to a "substantial" due process claim (see *Smith* v. *Robinson*, 468 U.S. 992, 1007 n.10 (1984); *Maher* v. *Gagne*, 448 U.S. 122, 132 & n.15 (1980))—founders on the fact that Continental's discrimination claim does not state a substantial claim under the Fourteenth Amendment Due Process Clause, which contains, as relevant here, only a prohibition on extraterritorial legislation, not a ban on discrimination. See, *e.g.*, *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*; *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425 (1980). Only the third alternative basis for fees—that Continental's Commerce Clause victory was reasonably related to a "substantial" equal protection claim—is potentially supportable, as the Court has upheld equal protection challenges to certain forms of discrimination against interstate commerce. See, *e.g.*, *Westinghouse Elec. Corp.* v. *Tully*, *supra*; *Metropolitan Life Ins. Co.* v. *Ward*, *supra*; *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949).[20] Nevertheless, Continental does not expressly rely on that ground in this Court. See Mot. to Aff. 20. And in any event, based on the Court's reluctance needlessly to address constitutional questions or to consider questions not addressed below, it would be sound practice for the Court to consider first the availability of fees on the Commerce Clause claim on which Continental prevailed; only secondarily, if necessary and if at all, should the Court consider the equal protection basis for fees, as that basis would require the Court to consider the merits of that constitutional claim and to do so without benefit of lower court adjudication of the claim.

CONCLUSION

The decision of the court of appeals should be vacated and the case remanded with instructions either to order dismissal or to conduct further proceedings to determine whether there is still a live case or controversy. Otherwise, the case should be set for hearing on the merits.

Respectfully submitted.

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MAY 1989

[20] In *Northeast Bancorp, Inc.* v. *Board of Governors, FRS*, 472 U.S. at 176-179, the Court, after having found that States' authorization of regional but not national interstate banking acquisitions was authorized by the Douglas Amendment, rejected an equal protection challenge. Justice O'Connor, concurring, expressed the view that the equal protection claim was not meaningfully distinguishable from the equal protection claim that the Court accepted (over her dissent) in *Metropolitan Life Ins. Co.* v. *Ward*, *supra*.

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AMICUS CURIAE

BRIEF

No. 87-1953

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether appellees' Commerce Clause challenge to Florida's rejection of their application to establish a federally insured, state-chartered industrial savings bank presents a live case or controversy in light of federal legislation that precludes the establishment of such an institution in Florida.

2. Whether Florida's across-the-board bar on the chartering of industrial savings banks violates the Commerce Clause.

3. Whether violations of the Commerce Clause may be challenged under 42 U.S.C. § 1983 and, for that reason, provide a basis for the award of attorney's fees under 42 U.S.C. § 1988.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-1955

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and continuing interest in the issues presented here:

when challenges to state legislation become moot; when neutral state enactments can be said to violate the Commerce Clause; and whether asserted Commerce Clause violations by state officials and local governments may be challenged under 42 U.S.C. § 1983.

All of these issues are recurring ones that have a direct impact on state and local governments. State and local officials have a plain interest in discouraging challenges to regulatory enactments that are based on hypothetical controversies and that accomplish little more than the generation of attorney's fees. And because state and local governments often are challenged in actions brought under the Commerce Clause, *amici* and their members will be directly affected by the rules this Court sets down concerning the scope of the Clause and the means by which relief may be sought for asserted violations of the Clause. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. The Douglas Amendment to the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. § 1842(d), precludes bank holding companies that have their principal operations in one State from establishing banks that are located in another State unless specifically permitted to do so by the latter State's statutes. *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985). This restriction, however, applies only to the establishment by bank holding companies of institutions that are defined as "banks" by the BHCA. The creation of institutions that do not fall within the definition, often referred to as "nonbank banks," is not regulated by the BHCA, even though "nonbank banks" are in many ways indistinguishable from "banks." *See Board of Governors v. Dimension Financial Corp*, 474 U.S. 361 (1986).

Prior to 1987, the BHCA defined as a "bank" only an institution that both accepted demand deposits and

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 36 of the Rules of this Court.

made commercial loans. 12 U.S.C. § 1841(c). In that year the definition was amended by the Competitive Equality Banking Act (CEBA), Pub. L. No. 100-86, § 101(a), 101 Stat. 554-557, to reach (with exceptions not relevant here) all institutions whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC).[2] The establishment or acquisition of such institutions across state lines is accordingly now restricted by the BHCA.

2. In 1981, the individual appellees and appellee Continental Illinois Bank Corporation, (now Continental Bank Corporation), a bank holding company with its principal place of business in Illinois, filed an application with appellant to establish an industrial savings bank in Miami, Florida. The application stated that "[a]ll deposit relationships" in the proposed institution would be insured "to the maximum extent allowed by the Federal Deposit Insurance Corporation." J.S. 1-2. It also indicated that the savings bank would not make commercial loans and would not offer demand deposits, although it would offer negotiable order of withdrawal (NOW) accounts. *Ibid.* Appellant rejected the application pursuant to Fla. Stat. § 658.29(1) and § 664.03(3), which made it illegal for an out-of-state bank holding company to obtain control over a Florida industrial savings bank.

Appellees then brought this suit in federal district court, challenging the constitutionality of §§ 658.29(1) and 664.03(3) under the Commerce Clause. The district court ruled for appellees, ordering appellant to process their application (J.S. App. 37a-51a); administrative consideration of the application has been stayed pending

[2] Even if not federally insured, an institution is a "bank" within the meaning of CEBA if it makes commercial loans and "accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others." Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987). This latter provision also is an expansion of the old BHCA definition. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

the outcome of this litigation. Appellant then moved the district court to alter or amend its judgment. While the motion was pending, the Florida legislature enacted Fla. Stat. § 664.02(1) (1984 & Supp. 1989)—the statute whose constitutionality is principally at issue here—which flatly prohibits the chartering of any new industrial savings banks, whether owned by in-state or out-of-state entities. But the court held that § 664.02 did not moot the case because the issues were " 'capable of repetition, yet evading review' " (J.S. App. 66a (citation omitted)), and it otherwise declined to alter its original judgment. The court did, however, deny appellees' request for attorney's fees.

3. The court of appeals affirmed the district court's judgment on the merits. J.S. App. 1a-30a. The court first held that § 664.02 is invalid under the Commerce Clause. While recognizing that § 664.02 is "facially neutral between in-state and out-of-state commerce in its absolute prohibition against the establishment of additional Florida [industrial savings banks]" (J.S. App. 12a), the court found that the statute has a discriminatory effect because it "erect[s] an insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies" (*id.* at 20a); the court reasoned that "[w]hile in-state bank holding companies are also precluded from establishing [industrial savings banks], they have the alternative of establishing traditional banks and thereby gaining access to Florida deposits." *Ibid.* Alternatively, the court held that § 664.02 "does not serve a valid local purpose." J.S. App. 16a. The court went on to hold that §§ 658.29 and 664.03 are unconstitutional because they discriminate against out-of-state bank holding companies. J.S. App. 25a-28a.

4. CEBA had been signed into law shortly before the court of appeals' decision; pointing to the new statute, appellant sought rehearing, arguing that the legislation mooted the case because the federally insured institution

proposed by appellees would be a "bank" within the meaning of the expanded BHCA definition and accordingly was barred from Florida by federal law. The court of appeals declined to alter its judgment, however, stating that CEBA would not "necessarily * * * make Continental's operation of an [industrial savings bank] in Florida a 'banking' activity in every instance," and adding that "[w]e cannot now guess what the parties will do." J.S. App. 34a. The court also awarded appellees attorney's fees on appeal, although it did not explain the basis of the award. *Id.* at 36a.

SUMMARY OF ARGUMENT

A. There is no longer a live controversy in this case. Appellees' pending application proposes the creation of an industrial savings bank whose deposit relationships would be insured by the FDIC. With the enactment of CEBA, federal law bars appellees from creating such an institution without Florida's consent. Appellees accordingly do not—and could not—argue that the State's refusal to charter the proposed institution violates the Commerce Clause. The Commerce Clause challenge in this case therefore remains live only if appellees have a settled intention to depart from their application and propose the establishment of an institution that will not be federally insured.

But nothing in the record indicates that appellees have any such intention. They have made only equivocal representations about their plans to propose creation of an uninsured institution. They have taken no action to amend their application, or to file a new one. And there is reason to doubt that any bank holding company would want (or would find it profitable) to operate an uninsured bank in the current financial climate; indeed, at present there is only a single (very small) uninsured depository institution operating in Florida. Against this background, the controversy here is wholly hypothetical and involves only "speculative contingencies" that "afford no basis for

[the Court's] passing on the substantive issues the [appellees] would have [the Court] decide." *Hall v. Beals*, 396 U.S. 45, 49 (1969).

B. If the Court reaches the merits, it should hold that Florida's across-the-board ban on the chartering of industrial savings banks is constitutional. In ruling the other way, the court below found that, despite the ban's facial neutrality, it had a discriminatory effect (because in-state companies may establish full-service banks, a business that is closed to out-of-state companies) and a protectionist purpose (because it was intended to protect in-state companies). That analysis, however, disregarded a central—and here dispositive—principle of Commerce Clause jurisprudence: restrictions on commerce that are imposed or authorized by Congress are immune from Commerce Clause attack.

While it is true that Florida firms retain the option of establishing traditional banks, out-of-state companies are precluded from pursuing that alternative, not by Florida law, but by the BHCA. In the absence of the BHCA the effects of Florida law inarguably would be neutral, and distortions in the market introduced by federal law cannot give rise to a Commerce Clause challenge. The purposes of the Florida statute, meanwhile—preserving the integrity of a regional banking network and maintaining local control over the availability of credit—were specifically endorsed by Congress in the BHCA and CEBA. That is enough to dispose of appellees' Commerce Clause challenge.

C. If the Court rules for appellees on the merits it nevertheless should hold that attorney's fees are unavailable because Commerce Clause challenges are not cognizable under 42 U.S.C. § 1983. Appellees are incorrect in asserting that § 1983 provides a cause of action whenever the plaintiff has standing to complain of a constitutional violation. In contrast to the Declaratory Judgment Act, for example, which permits a court to declare the "rights

or other legal relations of any interested party" in any "case of actual controversy within its jurisdiction" (28 U.S.C. § 2201(a)), § 1983 provides a cause of action only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws." The question here, then, is whether the Commerce Clause creates "rights" within the meaning of § 1983.

In our view, it does not. The Clause plainly does not confer an entitlement, personal to the individual, to trade freely between the States; it does not, after all, limit the authority of Congress to restrict commerce. Instead, like many of the provisions of Article I of the Constitution, the Commerce Clause was designed to allocate power between the national and state governments, and thus was intended to serve national rather than individual ends by forestalling the "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) (citation omitted). The benefits that the Clause confers upon individuals accordingly are entirely incidental to its purposes.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED OR REVERSED.

A. There Is No Longer A Live Controversy Between The Parties.

1. It is black letter law, of course, that "'[t]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite.'" *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), quoting *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947). The Constitution thus "limits federal courts to the adjudication of actual, ongoing controversies between litigants. * * * It is not enough that

a controversy existed at the time the complaint was filed." *Deakins v. Monaghan*, 108 S.Ct. 523, 528 (1988). *See Honig v. Doe*, 108 S.Ct. 592, 601 (1988). As the Court has explained in each of the related contexts of mootness, ripeness, and standing, the existence of such a controversy turns on " 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance' " of relief. *Golden*, 394 U.S. at 108, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 71 (1983); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974). *See generally* C. Wright & A. Miller, *Federal Practice & Procedure* (1987) § 3532.4 at 168-69.

There is no longer such a controversy in this case. Appellees' pending application, the consideration of which has been stayed by the Florida Division of Administrative Hearings, proposes the creation of an industrial savings bank whose "deposit relationships" would be insured "to the maximum extent allowed by the [FDIC]." J.S. 1-2. At the time the application was filed, the proposed institution would have been a "nonbank bank" and accordingly could have been established by an out-of-state bank holding company without running afoul of the BHCA. But with the enactment of CEBA, the institution described in appellees' application became a "bank" within the meaning of the BHCA; federal law bars the establishment of such an institution by appellees in Florida without the State's express approval.

Given the provisions of CEBA, appellees do not—and could not—argue that the State's refusal to charter the institution proposed in their pending application violates the Commerce Clause. *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434-36 (1946). The Commerce Clause challenge in this case

therefore remains live only if appellees intend to depart from their application and propose the establishment of an institution whose deposit relationships are not insured by the FDIC. Unless appellees have a fixed intention to pursue that course, this case will lack the necessary "alleg[ation] that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

As the Solicitor General observed prior to the Court's decision to note jurisdiction in this case, nothing in the record indicates that appellees have any such intention. U.S. Br. 7. Even in response to the Solicitor General, appellees made only equivocal representations about their plans to propose creation of an uninsured institution,[3] which they further hedged with the "qualification that conditions at the time warrant such proposals." Resp. to U.S. Br. 3. This is not the sort of representation that demonstrates a concrete, settled intention to pursue a definite course of action. *Compare Deakins*, 108 S.Ct. at 528-29 (Court gave credence to the plaintiff's statement that it would abandon a claim because the representation was enforceable through a dismissal of the claim with prejudice).

In fact, there are especially powerful reasons to be skeptical of appellees' carefully hedged representations. In a financial climate marked by record failures of banks and other savings institutions, it is highly unlikely that a bank holding company would want (or would find it profitable) to operate an uninsured bank. Indeed, the Florida Comptroller's Office informs us that, in the years since CEBA was enacted, not a single application for the establishment of an uninsured institution has been filed by an out-of-state bank holding company; at present,

[3] Appellee Continental indicated that "it intends to propose the creation of a Florida [industrial savings bank] subsidiary upon the successful completion of this litigation." Resp. to U.S. Br. 3. It did not expressly state that the proposed institution would not be insured by the FDIC.

there is only one (very small) uninsured depository institution of any kind in the State.[4] The controversy over the uninsured institution hypothesized by appellees accordingly is "wholly conjectural," and "is hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'" *Golden*, 394 U.S. at 109.

In the two years since the enactment of CEBA, moreover, appellees have failed to provide that evidence by amending their application to propose the creation of an uninsured institution. Appellees indicated in response to the Solicitor General that they had not filed such an amendment because the administrative proceeding concerning their pending application had been stayed, so that they "had no legal means by which [they] could amend [their] application for an [industrial savings bank]." Resp. to U.S. Br. 2. But the stay by its terms simply freezes administrative review of appellees' initial application, and we are aware of no provision of Florida law that would preclude an attempt either to amend the pending application or to submit a new one. See generally Fla. Admin. Code tit. 3C-9.002(6). Because appellees plainly must take one or the other action if they seriously intend to operate an uninsured institution in Florida, their failure to do so "over the course of the last [two] years speak[s] louder than [their] counsel's" equivocal statements to this Court. *Honig*, 108 S.Ct. at 602 n.6.[5]

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[4] The Bureau of Research of the Florida Comptroller's Office informs us that, as of July 24, 1989, there was a single uninsured depository institution in the State. That institution, the Surety Building & Loan Association, located in DeLand, Florida, had assets of just under $16,000,000 at the end of 1988.

[5] Indeed, despite appellees' contentions to the contrary (see Mot. to Dismiss or Affirm 14-15), it is far from clear that appellees may simply amend their pending application to indicate that the proposed institution will not be insured. Florida law provides that an application may be amended as a matter of course only within 30 days of its receipt for filing—a date, so far as appellees' application is concerned, that has long since passed. Fla. Admin. Code tit. 3C-9.002(6). "Otherwise, the application may only be amended with permission from the department [of banking]. * * * Requests to make material changes filed at any time after the application has been received may be deemed by the department to be grounds for denial, and a new application accompanied by the appropriate filing fee may be required." *Ibid.* It therefore appears that appellees will have to file an entirely new application and initiate a new administrative proceeding in the unlikely event that they intend to conform their proposal to the changes in federal law.

Against this background, the issue in this case might now more appropriately be viewed as one of ripeness than of mootness, although the label should not change the nature of the Article III inquiry.[6] The dispositive question in determining the existence of a live Commerce Clause controversy is whether appellees' plans to establish an uninsured institution have advanced sufficiently to make the controversy here something that is not "abstract or hypothetical." *Clements v. Fashing*, 457 U.S. 957, 962 (1982). Given appellees' failure to file a new or amended application, which would make the dispute here concrete, they plainly have not. Had appellees *never* filed an application, after all, they could not simply have walked into court to challenge the constitutionality of Florida law by alleging that they *might* apply for permission to operate an uninsured bank after obtaining a favorable judgment if "conditions at that time warrant." Yet, because appellees' pending application has been rendered fatally defective by the intervening change in federal law, they are effectively attempting to do just that.[7] The resulting complaint lacks "'*sufficient im-*

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[6] Appellees' original complaint—its challenge to the State's rejection of their application to establish an insured institution—plainly is moot, since appellees no longer seek to operate such an institution. The question now is whether appellees' challenge to the exclusion of an uninsured institution is sufficiently concrete to warrant immediate adjudication, a type of inquiry that usually is addressed under the rubric of ripeness. See C. Wright & A. Miller, *supra*, § 3532.2 at 169.

[7] This is not a case where filing an application would have irrevocable legal consequences or would subject appellees to criminal

mediacy and reality to warrant the issuance of a declaratory judgment.'" Preiser v. Newkirk, 422 U.S. 395, 402 (1975), quoting *Maryland Casualty Co.*, 312 U.S. at 273 (emphasis added by the Court).

At a minimum, appellees must make an unequivocal representation that they want (and are prepared) to operate an uninsured institution—a representation rising to the level of a "sufficient[] alleg[ation] that [state law] has prevented [them] from" engaging in action that they otherwise are prepared to take. *Clements*, 457 U.S. at 962. *See generally Mitchell*, 330 U.S. at 86-91. Absent such a representation, this case involves only "speculative contingencies" that "afford no basis for [the Court's] passing on the substantive issues the [appellees] would have [the Court] decide." *Hall v. Beals*, 396 U.S. 45, 49 (1969). While "[f]uture positions taken by the parties might bring such issues into controversy, * * * that possibility is simply too remote from the present controversy to keep this case alive." *Iron Arrow*, 464 U.S. at 71.[8]

penalties. *Compare Clements*, 457 U.S. at 962; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153-54 (1967). Appellees have asserted that preparing an amended application would cost $25,000 to $50,000, and that they are reluctant to incur these costs pending the outcome of this litigation. Resp. to U.S. Br. 3. We note that there is nothing in the record supporting appellees' factual assertion about costs. But in any event, the normal business costs of preparing and filing an application—an application that might be denied for a number of reasons unrelated to the statute at issue here (*see BankAmerica Savings Bank v. State of Florida*, 467 So.2d 1045 (Fl. 1st DCA 1985))—cannot be regarded as an excessive hardship that should exempt appellees from the normal Article III rules. *Compare Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 201-02 & nn.13, 14 (1983) (findings of fact established that postponement of decision "would impose a palpable and considerable hardship" on the plaintiffs because they would be forced to expend "millions of dollars over a number of years").

[8] This case does not, of course, fall into the mootness exception for controversies that are "capable of repetition, yet evading review"; the court has never held that doctrine applicable when, as

Because the controversy here is no longer live, the Court should vacate the decision below and remand the case to the district court with instructions to dismiss the complaint. *See Deakins*, 108 U.S. at 528; *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950). Alternatively, if the equivocal nature of appellees' actions and statements have created doubts about their plans—doubts tnat are intertwined with technicalities of Florida law and administrative procedure—the Court might vacate and remand the case for an exploration of appellees' "present intention[s] and future conduct." *Iron Arrow*, 464 U.S. at 73 (Brennan, J., dissenting). *See Sosna v. Iowa*, 419 U.S. 393, 402 n.12 (1975); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972).

2. Appellees' further contention that their request for declaratory relief "would not be moot even if Continental decided to abandon the particular application at issue" (Resp. to U.S. Br. 3) is without substance. Appellees suggest that they "and every other out-of-state bank holding company should be permitted to evaluate their

in this case, an otherwise long-term dispute is cut short by legislative action. *See, e.g., Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972); *Hall v. Beals*, 396 U.S. 45 (1969). In cases falling within the exception, the Court has indicated that the mootness inquiry turns on whether there is a "'reasonable expectation'" that the conduct giving rise to the litigation will be repeated. *Honig*, 108 S.Ct. at 602 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The Court's concern in such cases is "whether the controversy was *capable* of repetition and not * * * whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* at 606 n.2 (emphasis in original). Here, in contrast, the special factor that underlies the "capable of repetition" doctrine—the fear that a category of decisions will be unreviewable because of the inherently short duration of the controversies involved—is not present. Appellees accordingly must demonstrate something more than a hypothetical possibility that they will seek to engage in the conduct at issue; like any party at the outset of a lawsuit, they must clearly allege that, but for the limitations of Florida law, they "would engage in the very acts that would trigger the enforcement of the provision." *Clements*, 457 U.S. at 962.

business opportunities in Florida" with knowledge of the constitutionality of the State's statutes (*ibid.*). But the Court has made clear that is "not enough to say . . . that . . . [the plaintiff] has a 'further and far broader right to a general adjudication of unconstitutionality * * * [in] [h]is own interest as well as that of others.' * * * The constitutional[] * * * question must be presented in the context of a specific live grievance." *Golden*, 394 U.S. at 109-10 (citation omitted). Thus

> [n]o federal court, whether this Court or a district court, has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigrants in actual controversies." * * * The express limitation of the Declaratory Judgment Act to cases "of actual controversy" is explicit recognition of this principle.

Id. at 110 (citations and emphasis omitted). *See Hall*, 396 U.S. at 48.[9] Appellees plainly are asking for " 'an

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[9] Appellees' reliance (Mot. to Dismiss or Affirm 15; Resp. to U.S. Br. 3) on *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), is misplaced. There, the Court held that a challenge to a Florida statute barring out-of-state bank holding companies from establishing in-state investment offices did not become moot when the State permitted the plaintiff bank holding company to operate a single grandfathered office in Florida. *See id.* at 35 n.5. On the record there, the very fact that the plaintiff *was* operating a Florida investment office made clear that it had a concrete interest in maintaining such offices, and would likely seek to establish additional ones. Here, in contrast, there is reason to doubt that either appellees or any other out-of-state bank holding company have any interest whatsoever in establishing an uninsured bank in Florida. See pp. 9-10, *supra*. Indeed, in *BT Investment Managers* itself the Court doubted that there was a justiciable case or controversy about the constitutionality of a Florida statute excluding trust offices owned by out-of-state bank holding companies when the plaintiff company had not yet filed an application with the Federal Reserve Board for permission to establish a Florida trust subsidiary. *BT Investment Managers*, 447 U.S. at 51.

opinion advising what the law would be upon a hypothetical state of facts' " (*Preiser*, 422 U.S. at 401 (citation omitted)); the Court lacks jurisdiction to answer.

B. Florida's Decision To Stop Chartering Industrial Savings Banks Is Constitutional.

If the Court nevertheless finds that there is a live controversy here, it must determine whether Florida's across-the-board ban on the chartering of industrial savings banks violates the Commerce Clause. The court below engaged in that inquiry, and concluded that § 664.02 is unconstitutional for two reasons. Notwithstanding the statute's conceded "facial neutrality" (J.S. App. 12a), the court found that Florida law has a discriminatory effect because it "erect[s] an insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies" (*id.* at 20a); the court explained that "[w]hile in-state bank holding companies are also precluded from establishing [industrial savings banks], they have the alternative of establishing traditional banks and thereby gaining access to Florida deposits." *Ibid.* Alternatively, the court of appeals held that § 664.02 "does not serve a valid local purpose." J.S. App. 16a.

On the most superficial level, the analysis used below appears unexceptionable. This Court, of course, has adopted "what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986). Legislation that has a protectionist purpose or effect "is virtually *per se* invalid under the Commerce Clause." *Id.* at 579. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 109 S.Ct. 1262, 1280 (1989); *New Energy Co. v. Limbach*, 108 S.Ct. 1803, 1807, 1810 (1988); *Maine v. Taylor*, 477 U.S. 131, 148 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617,

624 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351-52 (1977). In contrast, "legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn." *BT Investment Managers*, 447 U.S. at 36. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The court of appeals appeared to parrot the distinctions drawn by these decisions. See J.S. App. 13a-23a.

In our view, however, the court of appeals went fatally astray in disregarding another—and here dispositive—principle of Commerce Clause jurisprudence: restrictions on commerce that are imposed or authorized by Congress are "invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S. at 174. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652 (1981). In this case, any disparate treatment accorded to out-of-state bank holding companies is the product of federal legislation, and the purposes served by the state law under attack are fully in line with congressional policy. Those conclusions should dispose of appellees' challenge.

1. The court of appeals' finding of discriminatory effect was central to its holding. At the outset, we note that such a finding in a Commerce Clause case is a factual one that must be grounded on the record. *See, e.g., Clover Leaf Creamery*, 449 U.S. at 472; *Hunt*, 432 U.S. at 350-52; *Bruce Church*, 397 U.S. at 144-46. Here, however, there was no record upon which the court below could base a factual judgment about the practical effects of § 664.02. And there are substantial grounds to doubt the validity of the court of appeals' conclusion that § 664.02 would have a discriminatory impact by closing off an effective vehicle that out-of-state bank holding companies otherwise could use to enter the Florida market for deposits.

Prior to 1987, it may well have been the case, as the court below evidently assumed (see J.S. App. 20a-21a), that the operation of an industrial savings bank was an effective means for an out-of-state bank holding company to enter the Florida banking market. If so, however, the situation changed dramatically with the enactment of CEBA, which effectively precluded such institutions from obtaining federal deposit insurance. As we note above, it is hardly likely that an uninsured institution would be able to compete effectively for deposits in the current climate. In fact, out-of-state companies are far more likely to be successful in attracting Florida deposits by directly soliciting Florida customers to place their funds in out-of-state institutions—an activity that is not barred by Florida law and in which out-of-state bank holding companies are now engaged.[10] If the Court concluded that the effect of § 664.02 on the market for Florida deposits is dispositive, it accordingly should remand the case for the development of a record on the point.

Having said that, we have a more fundamental disagreement with the court of appeals' holding: the distortions in the Florida banking market are the products, not of § 664.02, but of federal legislation. Section 664.02 itself, of course, is neutral on its face; by barring the chartering of *any* industrial savings bank, "it 'visits its effects equally upon both interstate and local business.'" *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987), quoting *BT Investment Managers*, 447 U.S. at 36. *See Northwest Central Pipeline*, 109 S.Ct. at 1280; *Clover Leaf Creamery*, 449 U.S. at 471. Of course, it is true, as the court of appeals observed (J.S. App. 20a), that in-state firms "have the alternative of establishing traditional banks." But out-of-state bank

[10] See *Interstate Bank Expansion: Market Forces and Competitive Realities: The Report of the Florida Interstate Banking Study Group* (Jan. 1984) 31-34, 69-95, 104, 124.

holding companies are precluded from pursuing that alternative, not by Florida law, but by the BHCA. In the absence of the BHCA the effects of § 664.02 inarguably would be neutral, and distortions in the market introduced by federal law cannot give rise to a Commerce Clause challenge. *See Northeast Bancorp*, 472 U.S. at 174-75.[11]

It is no answer to this to say that § 664.02 "will apply most often to out-of-state entities" (*CTS Corp.*, 481 U.S. at 88) because they are the ones that would most often seek charters for industrial savings banks; even if that proposition were true—and there is reason to doubt it as a matter of fact[12]—"[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978). *See CTS Corp.*, 481 U.S. at 88. And equally as important, the court of appeals' approach fails to take into account "the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state

[11] In response to this point, the court of appeals observed only that *Northeast Bancorp* involved the regulation of "banks" within the meaning of the BHCA and that, in the absence of congressional authorization, the dormant Commerce Clause would prevent a group of States from barring the acquisition of in-region banks by out-of-region bank holding companies. This case, the court continued, involves the state regulation of nonbanks, which is not expressly authorized by the BHCA. J.S. App. 18a-19a n.5, citing *Northeast Bancorp*, 472 U.S. at 174. But the court of appeals' observation, while accurate, is beside the point. Unlike the impermissible legislation hypothesized in *Northeast Bancorp*, § 664.02 is neutral between in-state and out-of-state bank holding companies; any distinction in treatment between in-state and out-of-state companies is the result of the BHCA.

[12] At the time of the enactment of § 664.04, there were three industrial savings banks in Florida, none of which were owned by out-of-state entities. See Fla. Comptroller's Office, Div. of Banking, *1984 Annual Report* 82-83.

law." *Id.* at 87. The State should be free to structure its banking industry however it wishes, so long as its statutes are even-handed in their treatment of in-state and out-of-state companies. Section 664.02's facial neutrality satisfies this requirement.

2. Because any discriminatory effects felt by out-of-state bank holding companies are the products of the BHCA—and therefore are constitutionally irrelevant under the Commerce Clause—§ 664.02 is subject to constitutional attack only if the purposes underlying its enactment were illegitimate. The court below held that to be the case, concluding that the statute was intended to shield Florida banks from out-of-state competition. We would state the policies underlying the statute less pejoratively: at a time when Florida recently had joined a regional banking program,[13] the stated purpose of § 664.02 was to check the growing "'use of industrial savings banks to circumvent restrictions on interstate banking.'" J.S. App. 16a, quoting Committee on Commerce, Florida House of Representatives, Final Staff Summary of HB 801, at 2-3 (May 31, 1984). But however the purpose of the law is phrased, the court of appeals again failed to take into account the import of congressional action in judging the propriety of the State legislation.

As a general matter, "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose." *Maine v. Taylor*, 477 U.S. at 148. But Congress has stood that principle on its head in the area of banking regulation. This Court has recognized "the brader purposes underlying the BHCA as a whole and the Douglas Amendment in particular to retain local,

[13] Florida enacted its regional banking statute, Fla. Stat. § 658.295, several weeks prior to the enactment of § 664.02. Section 658.295 permits the acquisition of Florida banks by bank holding companies located in 11 other southeastern States and the District of Columbia, so long as those States permit reciprocal privileges to Florida bank holding companies.

community-based control over banking." *Northeast Bancorp*, 472 U.S. at 172. The BHCA and similar federal legislation [14] thus were expressly intended to restrict interstate commerce in banking, reflecting "the historical fact that our country traditionally has favored widely dispersed control of banking. While many other western nations are dominated by a handful of centralized banks, we have some 15,000 commercial banks attached to a greater or lesser degree to the communities in which they are located." *Id.* at 177.

Indeed, in 1984 the Federal Reserve Board found that the expansion of "nonbank banks" was threatening to subvert the congressional policy of state control over their own banking systems (49 Fed. Reg. 794, 833-36 (1984)), explaining that industrial savings banks in particular were being used to circumvent the federal limitations on interstate banking (*id.* at 834). While the Court's decision in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986), set aside the Board's attempt to restrict the use of "nonbank banks" as inconsistent with the language of the BHCA, Congress essentially overruled *Dimension* and forcefully reiterated the federal policy of local control over banking when it enacted CEBA.

CEBA was intended to "halt the aggressive exploitation of loopholes in our banking laws" that were "subvert[ing] the right of the States to determine their own banking structure." S. Rep. No. 19, 100th Cong., 1st Sess. 1-2, 7 (1987). In enacting CEBA, Congress explained that the BHCA had been intended "to preserve a decentralized banking system and to maintain local control over local credit resources." And specifically noting and approving the use of regional banking compacts such as the one in which Florida participates, Congress explained that "most of those [state regional banking] laws have been carefully

[14] The McFadden Act, 12 U.S.C. § 36(c), for example, prohibits banks that are members of the Federal Reserve system from branching across state lines.

drafted to permit regional banks to grow in size before taking on the full competitive onslaught of the major money center banks. These carefully designed regional timetables can be easily circumvented if the major money center banks are free to penetrate regional banking markets through nonbank banks irrespective of state law." *Id.* at 7. See 133 Cong. Rec. S4051-52 (daily ed. Mar. 27, 1987) (remarks of Sen. Proxmire); *id.* at S4058 (remarks of Sen. Glenn). Against this background, a state statute that is designed to preserve the integrity of a regional banking network—and to maintain local control over the availability of credit—accords perfectly with congressional policy, and therefore cannot be said to have a purpose that is illegitimate under the Commerce Clause.

It is true, of course, that Congress in CEBA did not bar the acquisition of uninsured institutions by out-of-state bank holding companies (see H.R. Conf. Rep. 261, 100th Cong., 1st Sess. 120 (1987)), and we therefore recognize that Florida could not *discriminate* against out-of-state bank holding companies in the chartering of uninsured industrial savings banks. But § 664.02 is even-handed in its regulatory effect. And its purpose—the preservation of a connection between the providers and consumers of credit—is fully consistent with the purposes of the BHCA and CEBA; " 'whatever effect the operation of [the state statute] may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage.' " *Northwest Central Pipeline*, 109 S.Ct. at 1281, quoting *Parker v. Brown*, 317 U.S. 341, 368 (1943). Certainly, to suggest that the congressional policy of maintaining local control over credit applies when the credit is extended by a "bank" but not by a "nonbank bank" is to draw a distinction that is "too impalpable to override the State's weighty interest." *Northwest Central Pipeline*, 109 S.Ct. at 1282.[15]

[15] The Court has held that a State's interest in preserving local control of banking is weighty enough justify geographical restric-

In these circumstances, the challenged state statute regulates evenhandedly in furtherance of a purpose that Congress has certified as constitutionally valid. And the State's regulatory method—closing the "nonbank bank loophole"—is one that Congress has recognized as not only effective but necessary to safeguard the integrity of the regional banking market. That is enough to dispose of appellees' Commerce Clause challenge.

C. Appellees Are Not Entitled To Attorney's Fees Because Commerce Clause Violations Are Not Actionable Under 42 U.S.C. § 1983.

If the Court finds that the controversy here is live and also concludes that appellees are entitled to prevail on the merits of their Commerce Clause claim, the question remains whether appellees are entitled to attorney's fees.[16] As framed in the third question presented in the jurisdictional statement, the availability of attorney's fees turns on whether Commerce Clause violations are action-

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tions that are challenged under the Equal Protection Clause. *Northeast Bancorp*, 472 U.S. at 177-78. While the tests for constitutionality under the Equal Protection and Commerce Clauses are not identical, there is an "obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." *Clover Leaf Creamery*, 449 U.S. at 470 n.14. That an intent to preserve local control over banking is a legitimate basis for state action under the former provision therefore suggests that such an intention should not invalidate otherwise legitimate action under the Commerce Clause. Indeed, the Court generally has indicated that a state purpose to encourage and strengthen domestic industry is a permissible one under the Commerce Clause, although that purpose cannot be accomplished by excluding out-of-state businesses. *See, e.g., New Energy*, 108 S.Ct. at 1810; *Bacchus*, 468 U.S. at 271; *Bruce Church*, 397 U.S. at 143. In this case, where the exclusion has been imposed by Congress, the State's purpose alone cannot invalidate its statute.

[16] If the case became moot on appeal, as we suggest above, appellees are not entitled to fees under 42 U.S.C. § 1988. *See Rhodes v. Stewart*, 109 S.Ct. 202, 203-04 (1988).

able under 42 U.S.C. § 1983.[17] That issue, in turn, is closely related to questions now before the Court in three pending cases: *Golden State Transit Corp. v. City of Los Angeles*, No. 88-840, which involves the actionability of Supremacy Clause violations under § 1983; and the consolidated cases of *McKesson Corp. v. Div. of Alcoholic Beverages*, No. 88-192, and *American Trucking Assns., Inc. v. Smith*, No. 88-325, which in part involve the substantive nature of the Commerce Clause. If the Court reaches the issue here, it should reject the proposition that violations of the Commerce Clause may be challenged under § 1983.

1. Appellee argued below (No. 85-3949 C.A. Br. 14, 16-22) that a plaintiff should have a cause of action under § 1983 whenever it has standing to assert a violation of the Commerce Clause—in other words, whenever there is injury in fact. That plaintiffs may be able to satisfy constitutional (and prudential) standing requirements, however, does not necessarily mean that Congress has provided them with a cause of action. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400-01 n.16 (1987). And here, appellees' contentions about the scope of § 1983 simply disregard the plain language of the statute. Sec-

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[17] While the court of appeals did not state the ground on which it awarded fees, appellant assumed in its jurisdictional statement (at 47-48) that the court meant to base the award on 42 U.S.C. § 1988 under the theory that appellees had prevailed in an action under § 1983. We agree that, of the four grounds advanced below by appellees to justify a fee award, the § 1983 theory is the only one that is even arguably plausible. As the Solicitor General noted (U.S. Br. 20), appellees' contention that appellant unreasonably "'multiplie[d] the proceedings, on appeal" was not and could not be supported by appellate findings. There was no substantial due process claim that might support an award of fees (*see Smith v. Robinson*, 468 U.S. 992, 1007 n.10 (1984)), because, as the Solicitor General also notes, there was no extraterritorial legislation here (*see Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980)). And *Northeast Bancorp v. Board of Governors, supra*, forecloses appellees' argument that they are entitled to fees because they had a substantial equal protection claim.

tion 1983 does not, in terms, provide a cause of action for the redress of *all* violations of *all* constitutional provisions; instead, it comes into play only when there has been a deprivation of "rights, privileges, or immunities secured by the Constitution and laws." Yet when Congress wants to create a cause of action that is broad enough to encompass all cases or controveries involving violations of the Constitution, it knows how to do so; indeed, it did just that in the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which provides that, "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights and other legal relations of any interested party." Congress declined to draw § 1983 in such broad terms.

The crucial question here, then, is whether the Commerce Clause secures "rights" (or "privileges" or "immunities") within the meaning of § 1983. As we also argue in *Golden State*, in our view a constitutional provision creates such rights when it is designed to specially benefit individuals or serves the purpose of protecting them from government intrusion. There is nothing novel in that reading of the statute: the Court has used a similar analysis in determining which *laws* create rights whose deprivation may be challenged under § 1983. *See Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 430 (1987); *id.* at 433 (O'Connor, J., dissenting). Indeed, while the legislative history of Section 1 of the 1871 Civil Rights Act, § 1983's predecessor, is somewhat obscure, virtually every specific description in that history of the interests protected by the statute refers to individual rights such as the equal protection and due process guarantees of the Fourteenth Amendment and the various rights secured by the first eight amendments to the Constitution. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 475-76 (1871) (remarks of Rep. Dawes) (Bill of Rights); Cong. Globe, 42d Cong., 1st Sess. App. 84-85 (1871) (remarks of Rep. Bingham) (equal protection, first eight amendments, and "rights of

conscience"); *id.* at 153 (remarks of Rep. Garfield) (equal protection). *See generally Monell v. Department of Social Services*, 436 U.S. 658, 665, 683-89 (1978); Note, *Development: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-56 (1977).

Thus Representative Shellabarger, who introduced the bill that became § 1983 and was one of its principal sponsors in the House (*see Monell*, 436 U.S. at 665, 669), expressly distinguished between provisions of the Constitution that allocate power and those that create individual rights:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of first article, that "no State shall make a treaty," "grant letters of marque," "coin money," "emit bills of credit," &c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. *These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers.* Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42 Cong., 1st Sess. App. 69 (1871) (emphasis added). As several courts of appeals have recognized, "the implication of Rep. Shellabarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146 n.16 (8th Cir.) *cert. denied*, 469 U.S. 834 (1984). *See White Mountain Apache Tribe v.*

Williams, 810 F.2d 844, 849 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987). Indeed, in one of its earliest interpretations of § 1983's predecessor statute, this Court held that the Contracts Clause—which, like the other provisions listed by Representative Shellabarger, appears in Art. I, Section 10 of the Constitution—does not confer a "right[] secured to individuals by the Constitution" within the meaning of the statute. *Carter v. Greenhow*, 114 U.S. 317, 323 (1885).[18]

2. In our view, the Commerce Clause also does not secure "rights" within the meaning of § 1983. The Clause plainly does not confer an entitlement, personal to the individual, to trade freely between the States; it does not, after all, "limit the authority of *Congress* to regulate commerce among the several States as it sees fit," or detract from Congress's authority to " 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.' " *Western & Southern*, 451 U.S. at 652 (emphasis in original), quoting *BT Investment Managers*, 447 U.S. at 44. Instead, like many of the other provisions of Article I of the Constitution, the Commerce Clause was designed to

[18] At the jurisdictional stage, the Solicitor General noted the Court's observation in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 n.16 (1972) (emphasis in original) (citation omitted), that the " 'rights, privileges, or immunities' " referred to in 28 U.S.C. § 1343(3) "embrace '*all* of the Constitution and laws of the United States.' " U.S. Br. 19. In fact, *Lynch* involved a claim under the Fourteenth Amendment's Due Process Clause, and the Court made the quoted observation in the course of rejecting the argument that § 1343(3) distinguished between claims based on personal liberty and those based on property rights—both, of course, species of individual rights. *Lynch* nowhere indicated that all constitutional provisions and laws create rights within the meaning of § 1983. Indeed, notwithstanding the language of *Lynch*, the Court has made it quite clear that some *laws* do not create rights. *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981); *Wright*, 479 U.S. at 433 (O'Connor, J., dissenting). Section 1983, of course, makes no distinction between the Constitution and laws.

allocate regulatory authority "between the national and the state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), reflecting what Chief Justice Marshall described as "the deep and general conviction, that commerce ought to be regulated by Congress." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827). In this way, the Clause embodies "the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986).

It is generally agreed that the Clause was placed in the Constitution in response to "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). During the preconstitutional period the United States had been unable to respond effectively to discriminatory commercial regulations adopted by other nations, while the individual States were able to—and did—use imposts as commercial weapons against one another. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 448-49, 465-69 (1941). By giving regulatory authority to the Federal Government, the Clause was designed to serve national rather than individual ends by forestalling the "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.' " *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) (citation omitted). *See Brown*, 25 U.S. (12 Wheat.) at 446 (Marshall, J.); *Gibbons v. Ogden*, 22

U.S. (9 Wheat.) 1, 224-25 (1824) (Johnson, J., concurring).[19]

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit—in contrast to those conferred by, for example, the Bill of Rights or the Civil War Amendments—is incidental. As the Court has noted, the Commerce and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (footnote omitted). Thus, despite occasional references in this Court's opinions "to a right to engage in interstate commerce, * * * the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways*, 730 F.2d at 1145.[20]

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[19] The Court has offered and discarded varying theories of the dormant Commerce Clause at different points during the development of the doctrine: that congressional authority over the regulation of commerce was meant to be exclusive (*see, e.g., Gibbons*, 22 U.S. (9 Wheat.) at 209; *id.* at 226-239 (Johnson, J., concurring)); that certain aspects of interstate commerce by their nature require a uniform system of regulation (*see, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-80 (1873)); or that Congress, by its silence, had indicated its intent to preclude state legislation (*see, e.g., Leisy v. Hardin*, 135 U.S. 100, 109 (1890)). All of these theories also assumed that the Clause was designed to allocate power rather than create individual rights.

[20] The Court's use of the word "rights" in a different context hardly amounts to a determination that the Commerce Clause creates "rights" within the meaning of § 1983. Indeed, the Court has made clear that violations even of a statute that expressly "speaks in terms of 'rights'" may not be actionable under § 1983. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981). We note that the Court has summarily affirmed a holding that an asserted violation of the Commerce Clause did not deprive a plaintiff of rights within the meaning of the predecessor to 28 U.S.C. § 1343(3), § 1983's jurisdictional counterpart. *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939).

The conclusion that § 1983 does not provide a cause of action for violations of the Commerce Clause will not, as appellees argued below, render the Clause unenforceable. In fact, so far as we are aware, § 1983 was not asserted as a cause of action for challenging violations of the Commerce Clause until quite recently;[21] the vast majority of Commerce Clause cases to reach this Court have come from the state courts, where the Clause has been used either affirmatively to challenge state enactments under state causes of action or defensively as a shield against offensive state conduct. Indeed, appellees here could have asserted their Commerce Clause claim in state court on review from the rejection of their application. *See BankAmerica Savings Bank v. State of Florida*, 467 So.2d 1045 (Fl. 1st DCA 1985). And aggrieved parties may, of course, seek federal court relief from Commerce Clause violations under the Declaratory Judgment Act, which, as we note above, provides a cause of action whenever there is a federal case or controversy.

We also take issue with the Solicitor General's hint (in its brief at the jurisdictional stage at 19-20) that ruling for appellant on the § 1983 issue might somehow create practical problems because some Commerce Clause challenges may be stated under the Fourteenth Amendment's Due Process or Equal Protection Clauses. We doubt that this situation will often arise; as the decisions

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[21] Section 1983 was sparingly used for any purpose prior to the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). See *Developments*, 90 Harv. L. Rev. at 1167-1169. And we are not aware of any decision resting on the proposition that Commerce Clause claims may be brought under § 1983 prior to *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1975), *aff'd on other grounds*, 425 U.S. 463 (1976).

cited by the Solicitor General themselves indicate, the various Clauses address different concerns. "The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made." *Metropolitan Life*, 470 U.S. at 876 n.6. And in those rare cases where the same set of facts may amount to violations both of the Commerce Clause and of the Fourteenth Amendment, we see no insuperable anomaly in allowing the latter category of claim to advance under § 1983 since, as we have noted, "[t]he two constitutional provisions perform different functions." *Metropolitan Life*, 470 U.S. at 881.

CONCLUSION

The judgment of the court of appeals should be vacated with instructions to dismiss the complaint as moot. Alternatively, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 9, 1989

JOINT

APPENDIX

(6)

AUG 10 1989

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No. 87-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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Note: The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed jurisdictional statement

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

Docket No. 81-0944

CONTINENTAL ILLINOIS CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Contienntal (sic) Illinois Savings Bank of Dade County,

Plaintiffs

v.

LEWIS, GERALD A. in his official capacities ad (sic) Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Defendants

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1981		
8/6	1	COMPLAINT for declaratory judgment and injunctive relief MOTION FOR PRELIMINARY INJUNCTION ref to WS
8/19	6	FILED Stipulation as to Facts Deemed Established ref. to WS
8/26	9	FILED Defendant's Answer
9/4	18	FILED Transcript of Hearing on Preliminary Injunction held on 8/31/81

DATE	NR.	PROCEEDINGS
1981		
9/24	19	FILED Order (WS) cc: to Newcomme, Baslie and Gamble 1. Plaintiffs' Motion for consolidation (Documentll) is DENIED. 2. The Florida Bankers Association etition (sic) to appear as amicus curiae (Document 13) is DENIED. 3. Plaintiffs' motion for preliminary injunction (Document 3) is GRANTED. Defendant is directed to accept for processing plaintiffs' application to establish the continental Illinois Savings Bank of Dade County.
11/18	22	FILED Motion for Summary Judgment and the Entry of a Permanent Injunction
	23	FILED Memorandum of law in Support of Plaintiffs' Motion for Summary Judgment and for the Entry of Permanent Injunction
1983		
12/13	42	ORDER. . . . (WC) cc: Newcomm, Basile and Gamble 1. The pltf's motion for permanent injunction is hereby granted. 2. Defdt's shall not exclude bank holding companies from operating Industrual Savings Banks in the State of Florida because of Fla. Stat. ::664.03(14) (1981), now :644.03(13) (1982). 3. Defdt's is directed to accept for processing in the regular course of business the pltf's application to establish an ISB in Florida.
		JS-6
12/23	43	MOTION. . . . to alter or amend judgment by defdt's

DATE	NR.	PROCEEDINGS
1984		
1/16	47	RESPONSE. . . . pltf's to motion to alter or amend judgment ref. WS
1/23	48	NOTICE. . . . pltf's of supplemenal authority by pltf's ref. WS
3/30	50	RESPONSE. . . . Pltf's Supplemental Response to Def's Motion to Alter and Amend Judgment. Ref. WS
6/18	54	SUGGESTION OF MOOTNESS. . . . defdt's and memorandum of law in support thereof ref. WS
6/19	55	SUGGESTION OF MOOTNESS. . . . supplement to defdt's ref. WS
7/17	58	RESPONSE. . . . plain. to def. suggestion of mootness ref. WS
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2/22	67	FINAL JUDGMENT. . . . Nunc Pro Tunc cc: Newcomm, Basile and Gamble
2/25	68	JUDGMENT. . . . cc: Newcomm, Basile and Gamble COB 35 PAGE 13-26
3/12	69	NOTICE OF APPEAL. . . . by defdt's cc: ECCA, and Newcomm
3/26	71	NOTICE. . . of cross appeal cc: ECCA, Basile and Gamble
7/12	78	MOTION. . . . pltf's for attorney's fees and supportin (sic) memorandum of Law
11/8	88	ORDER. . . . (WS) cc: Newcomm, Basile and Gamble * * *
12/9	89	NOTICE. . . . of appeal by pltf's cc: ECCA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. ———

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMANN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Plaintiffs,

v.

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs, Continental Illinois Corporation, and William D. Plechaty, Richard H. Hannemann, James P. Johnson, Gail M. Melick, and Robert J. Fiddes, as applicants and proposed organizers of Continental Illinois Savings Bank of Dade County, sue defendant, Gerald A. Lewis, in his official capacities as Comptroller of the State of Florida, and head of the Department of Banking and Finance of the State of Florida, and allege:

NATURE OF ACTION

1. This is an action for declaratory judgment, pursuant to 28 U.S.C. § 2201, seeking to declare Florida Statutes § 658.29(1), or a portion thereof, as applied to industrial savings (Morris Plan) banks pursuant to

Florida Statutes § 664.03(14), to be unconstitutional on its face and as applied to plaintiffs, and for a preliminary and permanent injunction, pursuant to 42 U.S.C. § 1983, restraining the direct or indirect enforcement, operation, and execution of the aforesaid Florida statutes and of any rules, regulations, interpretations, or directives which have been or may be promulgated thereunder or in reliance thereon. Florida Statutes §§ 658.29(1) and 664.03 (14) are attached hereto as Exhibit A and are referred to herein as the "challenged statutes."

JURISDICTION AND VENUE

2. The subject matter jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331, by virtue of defendant's violation of plaintiffs' constitutional and civil rights.

3. Venue is proper in accordance with 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Continental Illinois Corporation is a corporation organized under the laws of the State of Delaware with its principal place of business located in the State of Illinois. Plaintiff is a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. § 1841 *et seq.*

5. Plaintiffs, William D. Plechaty, Richard H. Hannemann, James P. Johnson, Gail M. Melick, and Robert F. Fiddes are the applicants (hereinafter the "Applicants") and the proposed organizers of Continental Illinois Savings Bank of Dade County, which is to be a Florida corporation proposing to engage in the business of an industrial savings (Morris Plan) bank located in Miami, Florida. The bank will be capitalized at $2,225,000 by the issuance of 100,000 shares of common stock with a par value of $10.00 per share and a selling price of

$22.50 per share. All of the shares have been subscribed to and will be purchased by plaintiff Continental Illinois Corporation and Continental Illinois Savings Bank of Dade County will thereafter a wholly-owned subsidiary of plaintiff Continental Illinois Corporation.

6. Defendant, Gerald A. Lewis, is Comptroller of the State of Florida and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over the grant or denial of applications to establish a Florida industrial savings (Morris Plan) bank.

CLAIMS FOR RELIEF

7. On June 9, 1980, the United States Supreme Court in *Lewis v. BT Investment Managers, Inc.*, 100 S. Ct. 2009 (1980), held to be in violation of the Commerce Clause of the Constitution of the United States pertinent portions of Florida Statutes § 659.141(1). Florida Statutes § 659.141(1) is attached hereto as Exhibit B. Florida Statutes § 659.141(1) prohibited, *inter alia*, any bank, trust company, or holding company, the operations of which are principally conducted outside of Florida, from owning, acquiring, or otherwise controlling any Florida bank, trust company, or business that furnishes investment advisory services. The Supreme Court expressly declared to be unconstitutional that portion of Florida Statutes § 659.141(1) which prohibited out-of-state ownership or control of a business that furnishes investment advisory or trust services in Florida.

8. Florida Statutes § 659.141(1), including the unconstitutional portions thereof, was reenacted in virtually verbatim form by the Florida Legislature in special session in Florida Statutes § 658.29(1), and was signed into law on or about July 1, 1980, after the Supreme Court's decision in *Lewis v. BT Investment Managers, Inc.*, *supra*. In the same Act, the Florida Legislature enacted Florida Statutes § 664.03(14), which extends the prohibition against out-of-state ownership contained in Florida

Statutes § 658.29(1) to industrial savings (Morris Plan) banks.

9. On remand from the Supreme Court in *Lewis v. BT Investment Managers, Inc.*, *supra*, a three-judge panel of this Court held that the declaration of unconstitutionality as to Florida Statutes § 659.141(1) "applies with equal force" to Florida Statutes § 658.29(1). *Lewis v. BT Investment Managers, Inc.*, TCA 73-184 (N.D. Fla. March 11, 1981).

10. On June 29, 1981, Applicants submitted to defendant, pursuant to Florida Statutes, Chapter 664, their application for the establishment of a Florida industrial savings (Morris Plan) bank (hereinafter the "Application") to be known as Continental Illinois Savings Bank of Dade County.

11. On July 9, 1981, defendant issued an order denying the Application to establish a Florida industrial savings (Morris Plan) bank. The order states, *inter alia*, that:

> 1. The Application to establish Continental Illinois Savings Bank of Dade County is hereby rejected as legally precluded by Subsection 658.29(1) Florida Statutes (1980 Supplement), as made applicable by Subsection 664.03(14), Florida Statutes.

A copy of this order is attached hereto as Exhibit C.

12. But for the unconstitutional prohibition contained in Florida Statutes § 658.29(1), as applied to industrial savings (Morris Plan) banks pursuant to Florida Statutes § 664.03(14), the Application would have been accepted and processed as required by Florida law.

13. The Applicants and Continental Illinois Corporation are ready, willing, and able to comply with all lawful statutory, regulatory, or supervisory provisions governing the conduct of an industrial savings (Morris Plan) bank in Florida.

14. The challenged statutes are not designed to promote lawful regulatory objectives, but are intended to shelter Florida financial institutions from competition by plaintiff Continental Illinois Corporation and by other out-of-state owners by preventing plaintiff Continental Illinois Corporation and other out-of-state owners from establishing wholly-owned subsidiary industrial savings (Morris Plan) banks in Florida.

15. The challenged statutes unlawfully prohibit interstate commercial intercourse between plaintiff Continental Illinois Corporation and other persons and the proposed Continental Illinois Savings Bank of Dade County by prohibiting plaintiff Continental Illinois Corporation from establishing and owning the proposed Continental Savings Bank of Dade County, in contravention of the Commerce Clause (Article I, Section 8) of the Constitution of the United States.

16. The challenged statutes unlawfully prevent plaintiff Continental Illinois Corporation from establishing and owning an industrial savings (Morris Plan) bank in Florida, even though such type of acquisition is permitted by Section 4(c)(8) of the Bank Holding Company Act, as amended, 12 U.S.C. § 1843(c)(8), and regulations promulgated thereunder by the Board of Governors of the Federal Reserve System. Such prohibition is in violation of the Supremacy Clause (Article VI) of the Constitution of the United States.

17. The challenged statutes unlawfully discriminate against plaintiffs and deprive them of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

18. The challenged statutes contain an arbitrary and capricious classification of the persons who may establish and own an industrial savings (Morris Plan) bank in

Florida, and unlawfully discriminate against and deny plaintiff Continental Illinois Corporation equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

19. The enforcement by defendant of the challenged statutes has caused continuing irreparable injury, financial loss, loss of potential profits, and loss of opportunity for corporate gain to plaintiffs. Unless restrained by action of this Court, the enforcement or threatened enforcement by defendant of the challenged statutes will cause continuing irreparable injury, financial loss, loss of potential profits, and loss of opportunity for corporate gain to plaintiffs, who will be deprived of federally guaranteed rights for an indefinite period of time. Plaintiffs have no adequate or effective remedy other than the relief sought herein.

20. Acting under color of state law, defendant, in his aforesaid order attached hereto as Exhibit C, denied plaintiffs their rights guaranteed by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983.

WHEREFORE, plaintiffs pray as follows:

(1) For the entry of judgment declaring that the challenged statutes on their face, and as applied to plaintiffs, are invalid and unconstitutional in violation of Articles I and VI of, and the Fourteenth Amendment to, the Constitution of the United States;

(2) For the entry of an order preliminarily and permanently enjoining defendant and his agents, employees, and representatives, from directly or indirectly enforcing, seeking to enforce, or in any way relying upon the challenged statutes or any rules, regulations, interpretations or directives promulgated thereunder or in reliance thereon;

(3) For the entry of judgment granting plaintiffs their attorneys' fees, pursuant to 42 U.S.C. § 1988, and their costs;

(4) For such other and further relief as may seem just and proper to the Court.

SHUTTS & BOWEN
Attorneys for Plaintiffs
1000 Southeast First National
Bank Building
Miami, Florida 33131
(305) 358-6300

/s/ Phillip G. Newcomm
PHILLIP G. NEWCOMM

/s/ Bowman Brown
BOWMAN BROWN

/s/ Eric B. Meyers
ERIC B. MEYERS

/s/ Andrew L. Gordon
ANDREW L. GORDON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Complaint for Declaratory Judgment and Injunctive Relief was hand delivered on this 6th day of August, 1981 to: JIM SMITH, ESQ., Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32302 and to GERALD A. LEWIS, Comptroller of the State of Florida, The Capitol, Tallahassee, Florida 32302.

/s/ Andrew Gordon
of Counsel

AG2

EXHIBIT A

• • • •

658.29 Certain ownership and control prohibited.

(1) Except as provided in subsection (3), no bank, trust company, or bank holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all, or substantially all, of the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or bank holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after December 20, [21], 1972, the effective date of former § 659.141 (1), as amended, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from December 20 [21], 1972, the effective date of former § 659.141(1), as amended, or from the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend the 2-year period from time to time if it determines that any such extension would not be detrimental to the public interest; but any such extension shall not exceed 1 year,

and all extensions shall not in the aggregate exceed 3 years.

(2) Except as provided in subsection (3), for the purposes of this section, the operations of a bank, trust company, or bank holding company are principally conducted outside this state if:

(a) In the case of a bank, the largest amount of its totals deposits is held outside this state.

(b) In the case of a trust company, the largest amount of its total trust assets is held or administered outside this state.

(c) In the case of a bank holding company, the largest amount of the total deposits of all banks controlled by the bank holding company is held outside this state or the largest amount of the total trust assets held by all trust companies controlled by the bank holding company is held or administered outside this state.

• • • •

664.03 Applicability of certain sections of chapters 658 and 661.

The following sections shall be applicable to industrial savings banks operating under this chapter:

(1) Section 658.16, relating to creation of a banking or trust corporation.

(2) Section 658.17, relating to notice of intent to organize.

(3) Section 658.18, relating to stock subscriptions and expenses of organization.

(4) Section 658.19, relating to an application for authority to organize a bank or trust company.

(5) Section 658.20, relating to investigations by the department.

(6) Section 658.21(1), (2), (4), (5), and (6), relating to decisions by the department.

(7) Section 658.22, relating to coordination with federal agencies and submission of articles of incorporation.

(8) Section 658.23, relating to commencement of corporate existence.

(9) Section 658.24, relating to organizational procedures.

(10) Section 658.25, relating to certificates of authority to transact business.

(11) Section 658.26, relating to places of transaction business, bank branches, school savings, and facilities.

(12) Section 658.27, relating to control and to definitions and related provisions.

(13) Section 658.28, relating to acquisition of control in an existing bank or trust company.

(14) Section 658.29, relating to prohibited ownership and control.

(15) Section 658.30, relating to the application of chapter 607, the General Corporation Act.

(16) Section 658.31, relating to articles of incorporation and amendments thereto.

(17) Section 658.33, relating to directors and officers.

(18) Section 658.34, relating to shares of stock.

(19) Section 658.35, relating to stock options.

(20) Section 658.36, relating to changes in capital.

(21) Section 658.38, relating to deposit insurance and membership in the Federal Reserve System.

(22) Section 658.39, relating to stockholders and the examination of records.

(23) Section 658.40, relating to definitions for merger, consolidation, and conversion.

(24) Section 658.41, relating to merger with resulting state or national bank.

(25) Section 658.42, relating to plans of merger and merger agreements.

(26) Section 658.43, relating to approval of mergers by the department, valuation of assets, and emergency action.

(27) Section 658.44, relating to approval of a merger by stockholders, rights of dissenting stockholders, and preemptive rights.

(28) Section 658.45, relating to certificates of merger, the effective date of mergers, and their effect on charters and powers.

(29) Section 658.47, relating to nonconforming assets of a merged business.

(30) Section 658.50, relating to bank loans and credit cards.

(31) Section 658.52, relating to statutory bad debts and ineligible assets.

EXHIBIT B

659.141—Control; ownership.—

(1) Except as provided in subsection (3), no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly all, or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from the effective date of this act or from the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship to extend said period of 2 years from time to time if it determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed 1 year and all thereof shall not in the aggregate exceed 3 years.

EXHIBIT C

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF BANKING

IN RE: CONTINENTAL ILLINOIS SAVINGS BANK OF DADE COUNTY, (proposed new industrial savings bank to be located at 888 Brickell Avenue, Miami, Dade County, Florida.)

ORDER REJECTING APPLICATION

GERALD LEWIS, as Comptroller of Florida, and Head of the Department of Banking and Finance, Division of Banking, having the power to administer and provide for enforcement of the Industrial Savings Bank Act, upon due consideration on the subject matter herein, and being fully advised in the premises, does, pursuant to Chapter 655.012 and Chapter 664, Florida Statutes (1980 Supplement), hereby ORDER:

That the application for authority to organize a corporation for the purpose of conducting the business of an industrial savings bank submitted by Continental Illinois Corporation (hereinafter referred to as Applicant) is hereby RETURNED WITHOUT CONSIDERATION OF THE MERITS.

FINDINGS OF FACT

1. On June 29, 1981, the Department of Banking and Finance, Division of Banking (hereinafter referred to as Department), received an application submitted, pursuant to Chapter 664, Florida Statutes (1980 Supplement), for authority to organize a corporation for the purpose of conducting the business of an industrial savings bank, to

be located at 888 Brickell Avenue, Miami, Dade County, Florida. Pursuant to Subsection 664.03(44), incorporating Subsection 658.73(2)(a), Florida Statutes, a check for $5,000 accompanied the application.

2. The proposed Industrial Savings Bank will be a wholly-owned subsidiary of Continental Illinois Corporation, 231 South La Salle Street, Chicago, Illinois 60693. Continental Illinois Corporation is a bank holding company, registered as such pursuant to the Bank Holding Company Act of 1956, as amended, 12 USC Section 841 *et seq*, the operations of which are principally conducted outside Florida.

CONCLUSIONS OF LAW

1. The establishment and operation of state-chartered industrial savings banks is governed by the provisions of Chapter 664, Florida Statutes.

2. Section 664.03, Florida Statutes (1980 Supplement), provides in relevant part:

> 664.03 Applicability of certain sections of Chapters 658 and 661—The following sections shall be applicable to industrial savings banks operating under this Chapter:
>
> (14) Section 658.29, relating to prohibited ownership and control.

3. Section 658.29, Florida Statutes (1980 Supplement), provides in relevant part:

> (1) • • • no bank, trust company, or *bank holding company*, the *operations of which are principally conducted outside this state, shall* acquire, retain, or *own*, directly or indirectly, all, or substantially all, of the assets of, *or control* over, *any bank*, or trust company having a place of business in this state where the business or trust business or functions are conducted, ... (E.S.)

4. It is clear that the Legislature intended the prohibition of Section 658.29, Florida Statutes, concerning ownership and control of a "bank" by an out-of-state bank holding company, to apply to an industrial savings bank. The reference to Chapter 664 found in the definition of "bank" in Subsection 658.12(3), Florida Statutes, is consistent with this interpretation.

5. An analysis of Section 658.29, Florida Statutes, demonstrates its applicability to the subject application. Proposed Continental Illinois Savings Bank of Dade County will be a wholly-owned subsidiary of Continental Illinois Corporation, a bank holding company the operations of which are principally conducted outside Florida.

6. As a result of the legal statutory barriers to the establishment of the proposed industrial savings bank by Continental Illinois Corporation, the Department concludes that it cannot accept and process an application which would be legally impossible to approve under any circumstances. To do otherwise, would unjustly deprive the Applicant of a filing fee and unfairly lead the Applicant to incorrectly conclude that the application would be processed and determined on its individual merits.

FINAL ORDER

Based on the foregoing, it is therefore ORDERED that:

1. The application to establish Continental Illinois Savings Bank of Dade County is hereby rejected as legally precluded by Subsection 658.29(1), Florida Statutes (1980 Supplement), as made applicable by Subsection 664.03(14), Florida Statutes.

2. The check for $5,000, which accompanied the application, shall be returned to the Applicant along with the application.

DONE AND ORDERED this 9th day of July, 1981, in Tallahassee, Florida.

/s/ Gerald Lewis
GERALD LEWIS, as Comptroller of the State of Florida and Head of the Department of Banking and Finance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER REJECTING APPLICATION was duly mailed by U.S. Mail to BOWMAN BROWN, ESQUIRE, Shutts and Bowen, Southeast First National Bank Building, 100 South Biscayne Boulevard, Miami, Florida 33131 this 9th day of July, 1981.

/s/ [Illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 81-0944

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMANN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Plaintiffs,

v.

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida,

Defendant.

STIPULATION AS TO FACTS DEEMED ESTABLISHED

Plaintiffs, Continental Illinois Corporation, William D. Plechaty, Richard H. Hannemann, James P. Johnson, Gail M. Melick, and Robert J. Fiddes, and defendant, Gerald A. Lewis, through their respective counsel, stipulate that the following material facts exist herein without substantial controversy and are not controverted:

(a) Plaintiff Continental Illinois Corporation is a corporation organized under the laws of the State of Delaware with its principal place of business located in the State of Illinois. Plaintiff is a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. § 1841 *et seq.*

(b) Plaintiffs, William D. Plechaty, Richard H. Hannemann, James P. Johnson, Gail M. Melick, and Robert F. Fiddes are the applicants and the proposed organizers of Continental Illinois Savings Bank of Dade County, which is to be a Florida corporation proposing to engage in the business of an industrial savings (Morris Plan) bank located in Miami, Florida. The industrial savings (Morris Plan) bank will be capitalized at $2,225,000 by the issuance of 100,000 shares of common stock with a par value of $10.00 per share and a selling price of $22.50 per share. All of the shares have been subscribed to and will be purchased by plaintiff Continental Illinois Corporation and Continental Illinois Savings Bank of Dade County will thereafter be a wholly-owned subsidiary of plaintiff Continental Illinois Corporation.

(c) Defendant, Gerald A. Lewis, is Comptroller of the State of Florida and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over the grant or denial of applications to establish a Florida industrial savings (Morris Plan) bank.

(d) On June 29, 1981, applicants submitted to defendant, pursuant to Florida Statutes, Chapter 664, their application for the establishment of a Florida industrial savings (Morris Plan) bank to be know as Continental Illinois Savings Bank of Dade County.

(e) On July 9, 1981, defendant issued an order denying the application to establish a Florida industrial savings (Morris Plan) bank. The order states, *inter alia*, that:

> 1. The Application to establish Continental Illinois Savings Bank of Dade County is hereby rejected as legally precluded by Subsection 658.29(1) Florida Statutes (1980 Supplement), as made applicable by Subsection 664.03(14), Florida Statutes.

(f) But for the prohibition contained in Florida Statutes § 658.29(1), as applied to industrial savings (Morris Plan) banks pursuant to Florida Statutes § 664.03(14), the Application would have been accepted and processed as required by Florida law.

(g) In the Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, plaintiffs referred to the brazen and blatant conduct of the defendant Comptroller in his enforcement of Florida Statutes § 658.29(1) and its predecessor. The source of this characterization was the opinion by the United States Court of Appeals for the Fifth Circuit in *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.13 (5th Cir. 1977) which portrayed as "brazen" the conduct of the Florida legislature as follows:

> [Court's footnote 13] Reviewing the circumstances of the enactment of the amendment to Fla. Stat. § 659.141(1), the Federal Reserve Board minced no words in characterizing the Florida legislature's actions as a brazen attempt to prevent out-of-state competition.

Plaintiffs recognize that quite apart from any opinion held by the defendant Comptroller as to the constitutionality of Florida Statutes § 658.29(1), as applied to industrial savings (Morris Plan) banks pursuant to Florida Statutes § 664.03(14), he is nevertheless duty bound to comply with legislation affecting the performance of his office. Consequently, all references made in the aforesaid Memorandum of Law to "brazen" or "blatant" conduct in connection with the enforcement of this legislation should not be read as applying to any conduct on the part of the defendant Comptroller.

(h) The applicants and Continental Illinois Corporation are ready, willing and able to comply with all lawful statutory, regulatory, or supervisory provisions gov-

erning the conduct of an industrial savings (Morris Plan) bank in Florida.

The foregoing facts shall be deemed established for all purposes herein.

DATED this 19th day of August, 1981.

/s/ Bowman Brown
Counsel for Plaintiffs

/s/ Michael Basile
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Stipulation as to Facts Deemed Established was hand delivered on this 19th day of August, 1981 to: JIM SMITH, ESQ., Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32302 and to GERALD A. LEWIS, Comptroller of the State of Florida, The Capitol, Tallahassee, Florida 32302.

/s/ Bowman Brown
of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 81-0944

CONTINENTAL ILLINOIS CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMANN (sic), JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Plaintiffs,

vs.

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking of the State of Florida,

Defendant.

DEFENDANT'S ANSWER

The Defendant, GERALD A. LEWIS, as Comptroller of Florida and Head of the Department of Banking and Finance, hereby files his Answer to the Complaint For Declatory Judgment and Injunctive Relief.

1. Paragraph one (1) is admitted.
2. Paragraph two (2) is admitted.
3. Paragraph three (3) is admitted.
4. Paragraph four (4) is admitted.
5. Paragraph five (5) is admitted.
6. Paragraph six (6) is admitted.
7. Paragraph seven (7) is admitted.

8. Paragraph eight (8) is admitted.

9. Paragraph nine (9) is admitted.

10. Paragraph ten (10) is admitted.

11. Paragraph eleven (11) is admitted.

12. Paragraph twelve (12) is admitted. The Defendant would further state that no review of subject application as to its completeness or as to the merits was performed by the Department. The application and filing fee was simply returned to Plaintiffs.

13. Paragraph thirteen (13) is admitted except that the Department does not admit that the proposed activities of Plaintiffs are lawful under federal or state law.

14. Paragraph fourteen (14) is denied.

15. Paragraph fifteen (15) is denied.

16. Paragraph sixteen (16) is denied.

17. Paragraph seventeen (17) is denied.

18. Paragraph eighteen (18) is denied.

19. Paragraph nineteen (19) is denied.

20. Paragraph twenty (20) is denied.

Defendant would also state that Plaintiffs should not be entitled to attorneys fees in this cause.

DATED this 26th day of August, 1981.

MICHAEL BASILE, General Counsel
and

/s/ Franklyn J. Wollett
FRANKLYN J. WOLLETT
Deputy General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32301
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Mail to: Bowman Brown, Esquire, Shutts & Bowen, Southeast First National Bank Building, Miami, Florida 33131, this 26 day of August, 1981.

/s/ Franklyn J. Wollett
FRANKLYN J. WOLLETT

BILL ANALYSIS

[SEAL]

FLORIDA HOUSE OF REPRESENTATIVES
H. Lee Moffitt, Speaker
Steve Pajcic, Speaker pro tempore
Committee on Commerce

Samuel P. Bell, III
Chairman

Dexter W. Lehtinen
Vice Chairman

FINAL STAFF SUMMARY

CS/HB 801 by Commerce and Rep. Meffert (as enacted by the Legislature) relating to banking

Date: May 31, 1984

Became Law: June 17, 1984

Ch. 84-216, Laws of Florida

Committee Consideration:
House Commerce
House Appropriations

Identical*/Similar Bills:
SB 947

Effective Date: multiple

I. SUMMARY AND PURPOSE

This bill was filed at the request of the Department of Banking and Finance. It makes a number of primarily technical changes in chapter 655, F.S., relating to financial institutions generally, and throughout the financial institutions codes. In addition, it creates a state-level currency transaction reporting requirement for large cash transactions similar to the provisions that already exist in federal law. It also increases the fees and semiannual assessments paid by state credit unions

by 15% across the board in order to bring the revenues derived by the department from such fees and assessments more in line with the costs it incurs in regulating credit unions. The bill revises the investment authority of banks and savings and loans to make those provisions more nearly the same and to provide additional flexibility for investments in subsidiary corporations. Finally, the bill includes a prohibition of any future chartering of industrial savings banks (ISBs) in Florida and provides that upon any agreement for a change in control the three ISBs that now exist could not expand beyond the counties in which they are then located.

II. CURRENT LAW AND EFFECT OF CHANGES

A. CURRENT LAW

Chapter 655, F.S., provides the general authority and procedures by which the Department of Banking and Finance regulates the activities of state banks, savings and loan associations, credit unions, trust companies, industrial savings banks, and international bank agencies. The financial institutions codes, chapters 657 through 665, provide more specific provisions governing each of these types of financial institutions.

B. EFFECT OF CHANGES

Because of the length of this bill and the number and wide variety of the changes included, this analysis is divided into one section dealing with the more substantial provisions of the bill and another which summarizes those provisions that are regarded by staff as being generally technical in nature.

1. Substantial Provisions

(a) Section 11 of the bill creates a state currency transaction reporting requirement similar to the require-

ment that already exists under federal law. Under this section, financial institutions will have to report to the Department of Banking and Finance all currency transactions in excess of $10,000. The Florida Department of Law Enforcement will have access to these reports, but otherwise they will be kept confidential. Financial institutions can satisfy the requirements of this section simply by filing with the department a copy of the report required under federal law, and the same exceptions that are available under federal law will also be available under the state provision. The bill provides both civil and criminal penalties for violation of this section which are comparable to the penalties applicable to violation of the federal law.

(b) Section 17 of the bill increases the semiannual fees paid by state credit unions by 15% across the board. Additionally, the department is authorized to make special assessments not exceeding 15% of a credit union's fees in any fiscal year. Information compiled by the department indicates that the cost of supervising state chartered credit unions will amount [to] approximately $786,000 in the current fiscal year. The income from fees at the current level is $450,000, leaving a deficit in credit union regulation of about $336,000. The proposed 15% increase will not erase this deficit, but it will reduce it by about 20%. The additional assessments, together with an increase in fees for new charter applications and the imposition of fees for the first time for merger applications will also serve to reduce the deficit to some extent.

(c) Sections 31 and 48 of the bill revise the investment authority for banks and savings and loan associations, respectively. The banking provision is changed extensively to make it comparable to the more liberal investment powers afforded to savings and loans. Perhaps the most significant change is in the area of investments in subsidiary or service corporations which would be permitted up to 20% of the total assets of the investing bank or association.

(d) Sections 34 and 35 of the bill were included in the bill because of growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking. Two years ago, the legislature imposed a one-year moratorium on the issuance of new ISB charters pending the outcome of litigation over the application of Continental Illinois Corporation to establish ISBs in Florida. A federal court in Florida has now ruled in favor of Continental Illinois, and in the wake of that decision both Citicorp and BankAmerica Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.

Accordingly, except for a temporary charter issued to facilitate a cross-industry conversion, merger, or acquisition, section 34 of the bill prohibits the issuance of any new industrial savings bank charters thus limiting the number of ISBs to the three that currently exist.

Section 35 then limits an ISB to the county or counties in which it is then authorized to maintain offices if it becomes the subject of an agreement to transfer control or ownership. This section is intended to preclude the possibility of one of the three existing ISBs being used as a vehicle by which an out-of-state bank holding company might establish a state-wide banking presence. Transfers by gift, will or intestate succession to a natural person and transfers without consideration in connection with a corporate reorganization or consolidation are exempt from this provision.

2. Technical provisions

(a) Section 1 amends the current statutory definition of "qualified public depository" to include those banks or

savings associations which have a branch office which is authorized by law to receive deposits in this state. Presently, only those banks or savings associations which have their principal place of business in Florida may qualify as a public depository.

(b) Section 2 creates a limited exemption from the 6-month residency requirement to obtain a mortgage brokers license for applicants who have been actively engaged in the business in another state for at least 12 months and who are employed by Florida licensed brokers who are FHA, FNMA, or FHLMC—approved.

(c) Section 4 allows the department to assess against applicants reasonable and necessary expenses incurred for such things as interpreters, communications, legal and economic research, and witness fees and expenses. Such assessments would be in addition to the application fees and are intended to reimburse the department for extraordinary costs that arise primarily in connection with applications involving foreign nationals.

(d) Section 5 revises a provision which requires that an emergency cease and desist order be held confidential until it is made permanent in order to permit the department to release such information where such confidentiality would result in a substantial financial risk to the public.

(e) Section 6 revises provisions relating to the removal of a financial institution official or employee to provide the department with flexibility to impose more limited sanctions.

(f) Sections 7 and 8 establish uniform provisions in chapter 655 governing articles of incorporation and certain accounting practices for all types of financial institutions in lieu of the various provisions which now exist.

(g) Section 19 provides for the establishment of a permanent loss reserve by the Florida Credit Union Guar-

anty Corporation into which the annual and special assessments against member credit unions would be paid. This provision is intended to ameliorate the consequences of an IRS ruling that such payments be taxed as income to the guaranty corporation. This section of the bill is virtually identical to the provisions of Senate Bill 466 which was also passed by the Legislature.

(h) Sections 20 and 40 revise provisions relating to the expenses of organizing a new bank or savings association, respectively. The savings and loan provision is conformed, generally, to the provisions now found in the banking code, and under both provisions the organizer is required to file an accounting of organizational expenses with the department and to furnish such information to the subscribers.

(i) Sections 22 and 38 conform the critiera for approval of applications for new banks and savings and loans; make it clear that the existence of all types of financial institutions in the primary service area should be taken into account in evaluating such applications; and revise terminology to conform with the types of economic and demographic data that are currently available.

(j) Section 25 eliminates the requirement that a bank must demonstrate that public convenience and necessity would be served by the establishment of a new branch. Under the bill, the establishment of branches will become a management decision of the bank subject only to the ability of the bank to support the operations of the branch. This conforms the state provision to the procedures prescribed by the Office of the Comptroller of the Currency for the establishment of branches by national banks and is essentially the same as the provision already applicable to S&Ls in this state.

(k) Section 26 extends provisions governing the acquisition of control of a bank to include approved but unopened banks and trust companies. Section 43 makes

similar changes with respect to savings and loan associations.

(l) Sections 27 and 28 clarify provisions governing the organization of a successor institution in connection with a "phantom merger." Section 42 does the same for S&Ls.

(m) Section 30 revises requirements relating to the approval of loans to bank officers and directors and increases the amount which may be lent to any individual officer or director from 10% of the capital accounts of the bank to 25%. This provision is in conformity with comparable provisions of federal law.

(n) Section 32 eliminates the need for a showing of public convenience and advantage in connection with the establishment of a trust department at an existing bank.

(o) Section 33 amends the definition of "international banking corporation" to conform with a comparable definition in federal law.

(p) Section 39 authorizes the use of the name "savings bank" by savings associations chartered under chapter 665. This provision is similar to Senate Bill 85 which was also passed by the Legislature.

(q) Section 41 revises terminology relating to the capital of a savings association to conform this provision with terminology used in the General Corporation Act, chapter 607, F.S.

(r) Section 42 provides that the merger of a state association into a federally chartered financial institution shall not be subject to approval by the department pursant to the provisions of section 665.0311.

(s) Section 48 reduces from 80% to 40% the percentage of a savings and loan association's mortgage loans that must be secured by property located within the state.

III. ECONOMIC IMPACT CONSIDERATIONS

A. PRIVATE SECTOR CONSIDERATIONS

Since the bill is generally technical in nature it should have little economic impact in the private sector, with the exception of the provisions relating to credit union fees, the credit union guaranty corporation, and industrial savings bank charters.

The increase in credit union fees will amount to about $67,500 in additional expense to state-chartered credit unions. The provision relating to the guaranty corporation, however, should save it about $150,000 in federal income tax and about $15,000 in state corporate income tax. Presumably, these savings can be passed along to its member credit unions.

B. PUBLIC SECTOR CONSIDERATIONS

The only probable impact in the public sector will be as a result of the increased credit union fees which would bring in an additional $67,500 to the Financial Institutions Regulatory Trust Fund, as projected by the Department Banking and Finance, and the loss of about $15,000 in corporate income tax receipts by virtue of the guaranty corporation provision.

IV. COMMENTS

Statement of Substantial Changes in Committee Substitute

Many provisions in the bill were rewritten to improve clarity and readability. A number of technical changes were made as well. In addition to these, the committee substitute includes four changes that are more substantial:

1. The currency transaction reporting requirement in the bill was altered to insure that exemptions available under federal law would also be available under state

law. And a sentence was added to provide specifically that a financial institution could comply with the reporting requirement simply by filing with the department a copy of the federal CTR form. Finally, the penalty section was revised to track the federal penalties.

2. The provisions in the bill relating to organizational expenses for banks and savings associations were significantly changed. As filed, the bill would have deleted most of the statutory restrictions on these funds in favor of a simple requirement that the institution satisfy the minimum capital requirements at the time it opened for business. The substitute bill retains the present limitations on expenditures from the organization fund and requires, in addition, that an accounting of those expenditures be filed with the department and furnished to the subscribers of stock of the institution.

3. Finally, the bill did not originally include the provisions which prohibit the issuance of any new industrial savings bank charters and restrict ISBs to the counties in which they are located upon a change in control.

V. LEGISLATIVE HISTORY

A. ENACTED BILL

Both HB 801 as introduced, and a proposed committee substitute (PCS) as described above, were agendaed for consideration by the Banking and Commerce Subcommittee on April 4. The PCS was taken up in lieu of the original bill. The subcommittee adopted 4 amendments which were included in the PCS for consideration by the full committee. The amendments added section 1 to the bill redefining the term "qualified public depository"; reduced from $500 to $250 the revised fee for application to organize a new credit union; reduced from 90 days to 60 the time within which the department must approve or disapprove amendments to credit union bylaws; and deleted from the bill a provision which would have required more current financial statements on credit union members who have preapproved lines of credit.

The PCS as amended, was taken up by the full Commerce Committee on April 9. Two more amendments were adopted. The first re-wrote the industrial savings bank provisions of the bill. A limited exception to the prohibition on the insurance of new charters was added so as to accomodate cross-industry mergers or conversions involving existing ISBs, and the restriction on branching by ISBs which would have confined them to a single country was deleted in favor of a provision that would permit unrestricted growth so long as an ISB is not sold to a new owner. In that event, the institution would thereafter be restricted to the county or counties in which it was then doing business. Additionally, an amendment was adopted to add to the bill a provision repealing the requirement that a state S&L make at least 80% of its mortgage loans on Florida real estate. As thus amended, the bill was recommended by the Commerce Committee as a committee substitute.

On April 17 the bill was withdrawn from the Committee on Finance and Taxation and was referred to the Appropriations Committee where it was approved with one additional amendment on May 8. The Appropriations amendment added to the bill section 2 which creates a limited exemption from the mortgage broker residency requirement.

The bill was then taken up by the House on May 28 and was further amended. The provision relating to S&L investments in mortgage loans was altered to require that 40% of such investments be secured by Florida real estate unless a lower percentage is established by the department pursuant to the competitive equality provisions of section 655.061. Another amendment advanced the effective date for 3 sections of the bill to June 17, 1984, the date on which the bill became law. The remainder of the bill is effective October 1. Two of the three sections

affected by this amendment were the ISB provisions, and the amendment was intended to insure that no ISB charters were issued on pending applications between the time the bill became law and the time it took effect. The other affected section had to do with S&L investments. In view of a pending change in corresponding federal regulations that would affect all FSLIC-insured institutions, it was hoped that Florida associations making investments under the more liberal provisions of state law might be grandfathered if the federal restrictions ultimately take effect.

An amendment to delete the currency transaction reporting requirement from the bill was laid on the table, and an alternative amendment to name the bill the "George Orwell Invasion of Privacy Act of 1984" was defeated. The bill was then read for the third time and passed by a vote of 105-1 (HJ-706, 707).

In the Senate, the bill was first referred to the Committee on Commerce and Appropriations and then subsequently withdrawn from committee and substituted for its companion, SB 947. An amendment to delete the currency transaction reporting requirement from the bill was first adopted and then reconsidered. Then the bill was passed by the Senate 32-1 (SJ-573).

B. DISPOSITION OF COMPANION

Senate Bill 947 was considered by the Commerce Committee on April 24 and was reported favorably with an amendment to revise the provisions relating to ISBs to conform to CS/HB 801. The bill was taken up by the Appropriations Committee on May 24 but consideration had not been completed when time expired. On May 29 the bill was withdrawn from the committee and placed on the Calendar. The following day the House bill was sub-

stituted for the Senate bill which was laid on the table under the rules.

Prepared by: /s/ Rod Jones
ROD JONES

Staff Director: /s/ Wyatt T. Martin
WYATT T. MARTIN

REVISED: June 19, 1984 BILL NO. SB 947

DATE: April 25, 1984 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	Analyst	Staff Director		Reference	Action
1.	Livingston	Martin	1.	COM	Fav./2 amend
2.	_____	_____	2.	AP	_____
3.	_____	_____	3.	_____	_____

SUBJECT:

Financial Institutions

BILL NO. AND SPONSOR:

CS/HB 801 by Commerce substituted for (SB 947 by Senator Grant

84- Laws of Florida

I. *SUMMARY*:

A. Present Situation:

This bill addresses various statutory provisions relating to depository financial institutions. The bill amends provisions in chapter 655, F.S., relating to financial institutions generally, the various chapters of the banking code, the credit union chapter, industrial savings banks, savings associations, public depositories, and the money order chapter.

The Department of Banking and Finance has suggested many of the changes proposed in the bill. A number of the changes relate to new language and other parts of the bill would amend current statutory provisions. The following analysis highlights the major provisions of the bill along with the current situation.

B. Effect of Proposed Changes:

The bill increases the semiannual fees paid by state credit unions by 15 percent. Additionally, the department would be authorized to make special assessments, not exceeding 15 percent of a credit union's fees in any fiscal year. A new fee of $500 would be added for a merger application. The department represents that the fee increases are necessary to meet their administrative and regulatory costs associated with credit unions. The current fees have caused the department to be operating at a deficit in the area of supervising credit unions and the fee increases would help to offset the deficit.

Sections 31 and 48 of the bill revise the investment authority for banks and savings and loan associations, respectively. The banking provision is changed extensively to make it comparable to the more liberal investment powers authorized for savings and loans. Perhaps the most significant change is in the area of investments in subsidiary or service corporations which would be permitted up to 20 percent of the total assets of the investing bank or association.

Two years ago, the Legislature imposed a 1-year moratorium on the issuance of new industrial savings bank charters pending the outcome of litigation over the application of an out of state banking corporation to establish ISB's in Florida. A federal court in Florida has now ruled in favor of the applicant. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida.

Accordingly, except for a temporary charter issued to facilitate a cross-industry conversion, merger, or acquisition, section 34 of the bill prohibits the issuance of any new indutrial savings bank charters thus limiting the number of ISBs to the three that currently exist.

Section 35 then limits an ISB to the county or counties in which it is then authorized to maintain offices if it becomes the subject of an agreement to transfer control or ownership. Transfers by gift, will or intestate succession to a natural person and transfers without consideration in connection with a corporate reorganization or consolidation are exempt from this provision.

The bill would create a state currency transactions reporting requirement similar to the requirement that exists under federal law. Financial institutions would have to report to the Department of Banking and Finance all currency transactions in excess of $10,000. The Florida Department of Law Enforcement would have access to these reports, but otherwise they would be kept confidential. Financial institutions could satisfy these requirements simply by filing with the department a copy of the report required under federal law, and the same exceptions that are available under federal law would also be available under the state provision. The bill provides both civil and criminal penalties for violation of this section which would be comparable to the penalites applicable to violation of the federal law.

Other changes in the bill include the following:

(a) Section 1 amends the current statutory definition of "qualified public depository" to include

those banks or savings associations which have a branch office which is authorized by law to receive deposits in this state. Presently, only those banks or savings associations which have their principal place of business in Florida may qualify as a public depository.

(b) Section 2 creates a limited exemption from the 6-month residency requirement to obtain a mortgage brokers license for applicants who have been actively engaged in the business in another state for at least 12 months and who are employed by Florida licensed brokers who are FHA, FNMA, or FHLMC-approved.

(c) Section 4 would allow the department to assess against applicants reasonable and necessary expenses incurred for such things as interpreters, communications, legal and economic research, and witness fee and expenses. Such assessments would be in addition to the application fees and are intended to reimburse the department for extraordinary costs that arise primarily in connection with applications involving foreign nationals.

(d) Section 5 revises a provision which requires that an emergency cease and desist order be held confidential until it is made permanent in order to permit the department to release such information where such confidentiality would result in a substantial financial risk to the public.

(e) Section 6 revises provisions relating to the removal of a financial institution official or employee to provide the department with flexibility to impose more limited sanctions.

(f) Sections 7 and 8 would establish uniform provisions in chapter 655, Florida Statutes, gov-

erning articles of incorporation and certain accounting practices for all types of financial institutions in lieu of the various provisions which now exist.

(g) Section 19 provides for the establishment of a permanent loss reserve by the Florida Credit Union Guaranty Corporation into which the annual and special assessments against member credit unions would be paid. This provision is intended to address the consequences of an IRS ruling that such payments be taxed as income to the guaranty corporation.

(h) Section 20 and 40 revise provisions relating to the expenses of organizing a new bank or savings association, respectively. The savings and loan provision would be conformed, generally, to the provisions now found in the banking code, and under both provisions the organizer would be required to file an accounting of organizational expenses with the department and to furnish such information to the subscribers.

(i) Sections 22 and 38 would conform the criteria for approval of applications for new banks and savings and loans making it clear that the existence of all types of financial institutions in the primary service area should be taken into account in evaluating such applications and would review terminology to conform with the types of economic and demographic data that are currently available.

(j) Section 25 would eliminate the requirement that a bank must demonstrate that public convenience and necessity would be served by the establishment of a new branch. Under the bill, the establishment of branches would become a

management decision of the bank subject only to the ability of the bank to support the operations of the branch. This would conform the state provision to the procedures prescribed by the Office of the Comptroller of the Currency for the establishment of branches by national banks and would be essentially the same as the provision already applicable to S & Ls in this state.

(k) Section 26 would extend provisions governing the acquisition of control of a bank to include approved but unopened banks and trust companies. Section 42 makes similar changes with respect to savings and loan associations.

(l) Sections 27 and 28 would clarify provisions governing the organization of a successor institution in connection with a "phantom merger". Section 41 does the same for S & Ls.

(m) Section 30 revises requirements relating to the approval of loans to bank officers and directors and increases the amount which may be lent to any individual officer or director from 10 percent of the capital accounts of the bank to 25 percent.

II. *ECONOMIC IMPACT AND FISCAL NOTE*:

A. Public:

Since the bill is generally technical in nature, its economic impact is not expected to be significant, with the exception of the provisions relating to credit union fees, the credit union guaranty corporation, and industrial savings bank charters.

The increase in credit union fees is estimated to approach $67,500 in additional expense to

state-chartered credit unions. The provision relating to the guaranty corporation, however, should save it about $150,000 in federal income tax and about $15,000 in state corporate income tax.

B. Government:

Credit unions fees are increased which would bring in additional $67,500 to the Financial Institutions Regulatory Trust Fund, as projected by the Department of Banking and Finance. The loss of about $15,000 in corporate income tax receipts by virtue of the guaranty corporation provision may be recognized.

III. *COMMENTS*:

APPELLANT'S

BRIEF

No. 87-1955

Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by failing to determine this case to be moot, or to remand it to the District Court for such determination, in view of amendments to the Bank Holding Company Act of 1956, by the Competitive Equality Banking Act of 1987, that prohibit establishment of Appellees' proposed industrial savings bank in Florida.

2. Whether the Court of Appeals erred in depriving Florida of authority over the issuance of corporate charters by invalidating, as violative of the Commerce Clause, Florida's statutory decision to issue no further industrial savings bank charters to any person.

3. Whether claims for violation of the dormant Commerce Clause are cognizable under 42 U.S.C. § 1983, so as to justify the Court of Appeals' award of attorneys' fees on appeal to the Appellees.

PARTIES

Appellant Gerald A. Lewis ("Lewis") is Comptroller of the State of Florida and head of the Department of Banking and Finance of the State of Florida (the "Department"). As head of the Department, Lewis is responsible for regulating state-chartered financial institutions in Florida, including "industrial savings banks," which, when such institutions existed in Florida, were chartered under Chapter 664, Florida Statutes.

Appellee Continental Bank Corporation, formerly known as Continental Illinois Corporation ("Continental"), is a Delaware corporation with its principal place of business in Chicago, Illinois. Continental is regulated as a bank holding company pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-50 (1982 & Supp. V 1987).

Appellees William D. Plechaty, Richard H. Hanneman, James P. Johnson, Gail M. Melick and Robert J. Fiddes are the proposed organizers of Continental Illinois Savings Bank of Dade County (the "Savings Bank"). It was proposed, in an application submitted to Lewis on June 26, 1981, that the Savings Bank would operate in Miami, Florida, as an industrial savings bank pursuant to Chapter 664, Florida Statutes, and would be a wholly-owned subsidiary of Continental.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-1955

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") are reported at 827 F.2d 1517 and 838 F.2d 457 and appear in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-36a. The orders of the United States District Court for the Northern District of Florida ("District Court") granting summary judgment and ordering final judgment *nunc pro tunc* are not reported but appear at J.S. App. 37a-69a.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1982), as in effect prior to September

25, 1988,[1] and 28 U.S.C. § 2101(c) (1982). This is an appeal from a decision of the Court of Appeals that, *inter alia*, invalidated Fla. Stat. § 664.02 (1987) as repugnant to the Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution. The Court of Appeals affirmed a final judgment rendered by the District Court. The original jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The appellate jurisdiction of the Court of Appeals was based on 28 U.S.C. §§ 1291 and 1294(1) (1982).

The Court of Appeals entered judgment on September 22, 1987, and denied the petition for rehearing of Appellant Lewis on February 26, 1988. Lewis served a notice of appeal, pursuant to Rule 10 of the Rules of this Court, on May 18, 1988. This appeal was docketed on May 25, 1988, within 90 days from the date of the denial of the petition for rehearing by the Court of Appeals. This Court noted probable jurisdiction on June 5, 1989. *Lewis v. Continental Bank Corp.*, 109 S.Ct. 2446 (1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Citations to relevant constitutional and statutory provisions are as follows. Pertinent text of these provisions is set forth in the Jurisdictional Statement ("J.S.") at J.S. xvi-xx.

U.S. Const. art. I, § 8, cl. 3.
12 U.S.C. § 1841(c)(1) (Supp. V 1987).
12 U.S.C. § 1813(h) (1982).
12 U.S.C. § 1842(d) (1982).
12 U.S.C. § 1846 (Supp. V 1987).
42 U.S.C. § 1983 (1982).

[1] 28 U.S.C. § 1254(2) (1982) was repealed, effective September 25, 1988, by Pub. L. No. 100-352, §§ 2(a) and 7, 102 Stat. 662, 664 (1988). However, under Section 7 of Pub. L. No. 100-352, 102 Stat. 664, the repeal of 28 U.S.C. § 1254(2) does not apply to appeals pending in this Court on September 25, 1988. This appeal was docketed on May 25, 1988.

42 U.S.C. § 1988 (1982).
Fla. Stat. § 664.02 (1987).

STATEMENT OF THE CASE

This case raises important issues of first impression concerning the impact of the Commerce Clause on the authority of states to charter financial institutions and other corporations. The Court of Appeals has held that the Florida Legislature is without constitutional power to withdraw chartering authority for a class of state-created financial institutions, *viz.* industrial savings banks ("ISBs"). To the knowledge of Appellant, this is the first time that the Commerce Clause has been applied to deny a state the right to determine whether or not it wishes to charter a particular class of state-created corporations. This case additionally presents the important question of whether a violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983 so that attorneys' fees may be allowed under 42 U.S.C. § 1988.

There are no ISBs in Florida today. In considering whether Florida's decision to withdraw chartering authority for new ISBs is consistent with the Commerce Clause, and in addressing the further question of whether recent federal legislation has mooted this case, it is necessary to consider the pattern of shared federal and state regulation of bank holding companies and their subsidiaries. Under Section 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50 (1982 & Supp. V 1987) ("BHC Act"), popularly known as the "Douglas Amendment," a bank holding company whose principal banking operations are located in one state may not acquire a "bank" in another state unless such acquisition is specifically authorized by the statutory law of the latter state.[2] The Douglas Amendment authorizes each

[2] Under the Douglas Amendment, a bank holding company may not acquire a "bank" located outside of the state in which the operations of the holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later,

state to maintain the general federal prohibition on acquisitions of in-state banks by out-of-state bank holding companies, or to permit unlimited entry by such companies, or to allow limited entry by such companies subject to conditions such as geographic origin and reciprocity.[3] Florida has exercised its authority under the Douglas Amendment by allowing out-of-state bank holding companies to acquire Florida banks if (i) the headquarters and principal banking operations of such companies are located within a defined Southeastern region and (ii) the home states of such companies provide reciprocal access for Florida bank holding companies.[4]

The Douglas Amendment does not authorize a state to prohibit, on a discriminatory basis, the acquisition by out-of-state bank holding companies of local entities that do not fall within the definition of "bank" provided by Section 2(c) of the BHC Act, 12 U.S.C. § 1841(c).[5] At the same time, however, Section 7 of the BHC Act preserves to the states their historic authority to regulate bank holding companies and their subsidiaries on a nondiscriminatory basis, so long as such regulation does not

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"unless the acquisition of . . . a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d) (1982).

[3] Northeast Bancorp v. Board of Governors, 472 U.S. 159 (1985).

[4] Fla. Stat. § 658.295 (1987). *See infra* note 23.

[5] Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 47 (1980). Prior to August 10, 1987, Section 2(c) of the BHC Act defined "bank" to include any institution that both (i) accepted deposits that the depositor had a legal right to withdraw on demand, *and* (ii) engaged in the business of making commercial loans. Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986). Section 2(c) was amended, effective Aug. 10, 1987, to include within the definition of "bank" any institution (subject to certain exceptions) that accepts deposits insured by the Federal Deposit Insurance Corporation ("FDIC"). *See infra* notes 18 and 26-27, and accompanying text.

conflict with the purposes of the BHC Act.[6] The resolution of this case turns on the interplay of Sections 2(c), 3(d), and 7 of the BHC Act, as well as the impact of the Commerce Clause on the traditional authority of the states to regulate the chartering and governance of financial institutions and other corporations.

By an order issued on July 9, 1981, Lewis rejected, without ruling on the merits, the application of Continental, then known as Continental Illinois Corporation, and the individual Appellees to organize and operate the Savings Bank pursuant to Chapter 664, Florida Statutes, as a state-chartered ISB. Continental's application, filed on June 26, 1981, portions of which appear as an Appendix to this brief, proposes that the Savings Bank will accept negotiable order of withdrawal ("NOW") accounts and other depository accounts and make home mortgage and consumer loans. The application states that "[a]ll deposit relationships will be insured to the maximum extent allowed by the Federal Deposit Insurance Corporation."[7]

Lewis rejected the application on the ground that, as an out-of-state bank holding company, Continental was precluded from establishing a state-chartered ISB in Florida by Fla. Stat. § 658.29(1) (1981), made applicable to ISBs by Fla. Stat. § 664.03(14) (1981).[8] Con-

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[6] *BT Investment*, 447 U.S. at 48-49. Section 7 of the BHC Act reserves to each state "such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846 (Supp. V 1987).

[7] Application to Organize Continental Illinois Savings Bank of Dade County at A-29, Appendix at 12a.

[8] Fla. Stat. § 658.29(1) (1981) prohibited any bank holding company, such as Continental, whose operations were principally conducted outside of Florida, from acquiring any Florida bank. Section 664.03(14) (1981), now designated Fla. Stat. § 664.03(3) (1987), extended this prohibition on control of banking institutions by out-of-state bank holding companies to include Florida ISBs.

tinental responded by filing, on August 6, 1981, a complaint in the District Court for declaratory and injunctive relief. Joint Appendix ("J.A.") at 4.

On December 13, 1983, the District Court granted Continental's motion for summary judgment and enjoined exclusion of out-of-state bank holding companies from ownership of Florida ISBs.[9] In its December 13 order, the District Court held that Fla. Stat. §§ 658.29(1) (1981) and 664.03(14) (1981) violated the Commerce Clause insofar as they prohibited an out-of-state bank holding company from operating an ISB whose activities would be limited to those proposed in Continental's application.[10] During the pendency of requests by both parties to modify the District Court's order of December 13, 1983, the Florida Legislature amended Fla. Stat. § 664.02, in June 1984, to provide that no further charters for ISBs could be approved by the Department.[11]

[9] The District Court had previously granted Continental's motion for a preliminary injunction to require the Department to process its application. Following that preliminary order, the Florida Legislature amended Fla. Stat. § 664.02 (1981) to place a one-year moratorium on the issuance by the Department of further charters for ISBs. 1982 Fla. Laws 82-214 § 27, *codified at* Fla. Stat. § 664.02(2) (Supp. 1982). After that moratorium expired on July 1, 1983, the District Court entered its order of December 13, 1983, granting Continental's Illinois motions for summary judgment and a permanent injunction. *See* J.S. App. 39a-40a. Further consideration of Continental's application has been stayed by the Florida Division of Administrative Hearings pending the outcome of this litigation.

[10] Order of the District Court dated Dec. 13, 1983, J.S. App. 37a-50a.

[11] Fla. Stat. § 664.02(1) (1987), as amended by 1984 Fla. Laws 84-216, § 34, provides:

> The charters of industrial savings banks existing at the time of the adoption of this chapter shall continue in full force and effect, but no new charter may be granted for an industrial savings bank.

Fla. Stat. § 664.02(3) (1987) provides that the Department may issue a *temporary* ISB charter solely for the purpose of facilitating a merger or acquisition, and that no certificate to transact business may be granted in connection with any such charter. Under 1981 Fla. Laws 81-318 (Florida's regulatory "Sunset Act"), Section 664.02 and the other provisions of Chapter 664, Florida Statutes, are repealed effective October 1, 1991, and are scheduled for review by the Florida Legislature in advance of that date.

Lewis then filed a suggestion of mootness, on the ground that Fla. Stat. § 664.02 (Supp. 1984), as amended, prevented the Department from acting on Continental's application. On February 22, 1985, the District Court entered a final judgment *nunc pro tunc*. J.S. App. 51a-66a. In its judgment the District Court reaffirmed its earlier order of summary judgment and held that the case had not been rendered moot by the 1984 amendment to Fla. Stat. § 664.02. With regard to the question of mootness, the District Court held that the issues raised by Continental were "capable of repetition, yet evading review." [12]

Following the District Court's final judgment, Lewis filed an appeal and Continental filed a cross-appeal. Continental also moved for an award of attorneys' fees by the District Court pursuant to 42 U.S.C. § 1988, based on alleged violations of civil rights under 42 U.S.C. § 1983. In the alternative, Continental asked the District Court to award such fees based on alleged "bad faith" conduct by the Department. The District Court entered an order denying the motion for attorneys' fees without explanation, and Continental appealed that order.

In the consolidated appeals, the Court of Appeals held on September 22, 1987, that Fla. Stat §§ 658.29(1) and 664.03(3) (1981) violated the Commerce Clause on their face. Because Florida law permitted ISBs to accept NOW accounts, but not deposits that depositors had a legal right to withdraw on demand, the Court concluded that ISBs could not be considered "banks" within the meaning of Section 2(c) of the BHC Act.[13] The Court of

[12] Order dated Feb. 22, 1985, J.S. App. 66a.

[13] *Continental*, 827 F.2d at 1522 n.7, 1523, J.S. App. 21a, 24a-28a. In holding that the inability of Florida ISBs to accept demand deposits prevented such institutions from being treated as "banks"

Appeals held that Section 3(d) of the BHC Act did not empower Florida to prohibit the acquisition of "non-banks," where such prohibition applied *only* to out-of-state bank holding companies. The Court of Appeals, therefore, held that Florida's prohibition against acquisition of ISBs by out-of-state bank holding companies was not authorized by federal law and violated the Commerce Clause.[14] The holding of the Court of Appeals with respect to Fla. Stat. §§ 658.29(1) and 664.03(7) is not challenged in this appeal.

The Court of Appeals agreed with Lewis that, because he was no longer authorized to issue ISB charters under Fla. Stat. § 664.02, the case was moot if Florida's decision to withdraw chartering authority for new ISBs was constitutional. The Court further acknowledged that Fla. Stat. § 664.02 was "facially neutral between in-state and out-of-state commerce in its absolute prohibition against the establishment of additional Florida ISB's."[15] However, the Court held that the statute was discriminatory in both its intent and practical effect and did not serve a valid local purpose. The Court concluded that "such protectionist legislation is unconstitutional in the context of non-banks."[16] The Court remanded the attorneys' fee question to the District Court for an explanation of the factual and legal basis on which Continental's motion for attorneys' fees had been denied.[17]

Lewis petitioned for rehearing on October 12, 1987, on two grounds. First, Lewis pointed out that, while the consolidated appeals were pending for decision by the

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under Section 2(c) of the BHC Act, the Court of Appeals relied on Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986).

[14] *Continental*, 827 F.2d at 1523, J.S. App. 24a-28a (citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)).

[15] *Continental*, 827 F.2d at 1520, J.S. App. 11a-12a.

[16] *Continental*, 827 F.2d at 1521, J.S. App. 17a-18a (citing *BT Investment*, 447 U.S. at 38).

[17] *Continental*, 827 F.2d at 1523-24, J.S. App. 28a-30a.

Court, Congress had amended Section 2(c) of the BHC Act, effective August 10, 1987, to include within the definition of "bank" any institution that accepts deposits insured by the FDIC.[18] Because Continental had proposed that the Savings Bank would accept FDIC-insured deposits,[19] and because Continental could not acquire a "bank" in Florida due to the Douglas Amendment, Lewis contended that approval of the application was now barred by federal law and the case was moot. Second, Lewis maintained that the Court of Appeals' decision holding that Florida could not withdraw chartering authority for ISBs in the state was ambiguous in its scope and did not comport with this Court's decisions in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

Lewis' petition for rehearing was denied on February 26, 1988. While acknowledging that the amendments to the BHC Act, effective August 10, 1987, had "significantly altered the definition of a 'bank,'" the Court of Appeals declined to find that the case had become moot. The Court implied that Continental might choose to establish an uninsured ISB and stated that "[w]e cannot now guess what the parties will do or not do as a result of the enactment of the August 10, 1987 amendments."[20] In addition, the Court of Appeals granted Continental's motion for attorneys' fees on appeal. The Court of Appeals did not explain the legal or factual basis for its award of attorneys' fees on appeal, but directed the

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[18] 12 U.S.C. § 1841(c)(1)(A) (Supp. V 1987), as amended by Act of Aug. 10, 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 554 (1987), provides that the term "bank" shall include "[a]n insured bank as defined in section 3(h) of the Federal Deposit Insurance Act." Section 3(h) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1813(h) (1982), defines "insured bank" to include "any bank . . . the deposits of which are insured in accordance with the provisions of [the FDI Act]."

[19] *See supra* note 7, and accompanying text.

[20] *Continental*, 838 F.2d at 458, J.S. App. 33a-34a.

District Court to determine the "reasonable" amount of such fees.[21]

SUMMARY OF ARGUMENT

It is clear that this case has become moot. The 1987 amendment to Section 2(c) of the BHC Act expanded the definition of "bank" to include all FDIC-insured institutions. Section 3(d) of the BHC Act prohibits any out-of-state BHC from acquiring a "bank" in Florida without Florida's specific statutory authorization. Because Continental has not received such authorization, it may not acquire an FDIC-insured institution in Florida. Therefore, organization of Continental's proposed institution is now prohibited by federal law. While Continental could theoretically attempt to apply to establish an *uninsured* ISB in Florida, it has not done so nor has it represented (despite several opportunities to do so) that it actually intends to make such an application. Moreover, because it would be contrary to prevailing industry practice and consumer expectations for Continental to offer only uninsured deposit services, Continental's operation of such an institution in Florida is entirely speculative. The Court of Appeals, therefore, erred on rehearing when it failed to determine that this case was moot or to remand this case to the District Court for a determination of mootness.

The Court of Appeals also erred in applying the Commerce Clause to strike down Fla. Stat. § 664.02, by which the Florida Legislature decided to issue no further ISB charters in Florida. This extraordinary and unwarranted interference with Florida's authority to regulate evenhandedly the chartering and governance of banking institutions and other corporations violates the federal policy of deference to state authority over corporations indicated by *CTS Corp.*, 481 U.S. at 87-94. Moreover, the Court

[21] *Id.* The Court of Appeals also clarified its mandate to the District Court with respect to attorneys' fees by instructing the District Court to make a *de novo* reconsideration of Continental's motion for attorneys' fees.

of Appeals improperly redefined the relevant market, for purposes of its Commerce Clause analysis, from that regulated by the statute's own terms (*i.e.*, the market for ISB charters) to the entire market for Florida deposits, an approach clearly at odds with *Exxon*, 437 U.S. at 125-29.

In addition, Fla. Stat. § 664.02 meets each of the three tests for validity under the Commerce Clause articulated in *CTS Corp.* and *Exxon*. First, the statute evenhandedly denies ISB charters to all in-state and out-of-state persons and, therefore, does not discriminate against interstate commerce. The only discrimination identified by the Court was that Florida and Southeastern regional bank holding companies can gain access to Florida deposits by acquiring "traditional" Florida banks, while bank holding companies outside the Southeastern region cannot do so. This discrimination is *not* the result of Fla. Stat. § 664.02, but is a consequence of the Douglas Amendment. Such discrimination is authorized by federal law and is, therefore, immune from challenge under the Commerce Clause. *Northeast Bancorp*, 472 U.S. 174-75. Second, Fla. Stat. § 664.02 does not subject interstate commerce to multiple and inconsistent burdens since it regulates *only* the chartering of *Florida* ISBs. Finally, the statute does not place an undue burden on interstate commerce because it permits Continental and other bank holding companies outside the Southeastern region to provide a large volume of banking services (including deposit services) to Florida residents by means other than the operation of ISBs.

The Court of Appeals further erred in awarding Continental attorneys' fees. The dormant Commerce Clause does not create a right or immunity secured by the Constitution within the meaning of § 1983. Therefore, no cause of action is created under § 1983 and no attorneys' fees are authorized under § 1988. Neither legislative intent nor judicial precedent supports extending § 1983 to dormant Commerce Clause claims, and to do so would only foster enormous damage and fee claims

by business interests instead of vindicating individual civil rights as intended by § 1983. Finally, regardless of § 1983's applicability, Continental was not a prevailing party within the meaning of § 1988 so as to be entitled to an award of attorneys' fees.

ARGUMENT

I. IN VIEW OF THE NEW DEFINITION OF "BANK" IN SECTION 2(c) OF THE BANK HOLDING COMPANY ACT, THE COURT OF APPEALS SHOULD HAVE DETERMINED THIS CASE TO BE MOOT OR REMANDED THIS CASE TO THE DISTRICT COURT FOR SUCH DETERMINATION.

A. The Douglas Amendment Now Bars Continental from Establishing Its Proposed Industrial Savings Bank in Florida.

As the Court of Appeals recognized in its decision of September 22, 1987, Continental may *not* establish an ISB in Florida if that institution falls within the definition of "bank" under Section 2(c) of the BHC Act.[22] The Douglas Amendment (Section 3(d) of the BHC Act) provides that Continental, whose principal banking operations are located in Illinois, may not acquire a "bank" in Florida unless Florida statutory law specifically authorizes such an acquisition. It is undisputed that Florida has *not* given this authorization to Continental. Florida's Regional Reciprocal Banking Act of 1984 (Fla. Stat. § 658.295) permits acquisition of banks in Florida only by bank holding companies located within the Southeastern region and, therefore, does not permit Illinois bank holding companies to acquire Florida banks.[23]

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[22] *See Continental*, 827 F.2d at 1521 n.5, 1522 and n.6, 1523, J.S. App. 18a-20a, 24a-28a.

[23] Fla. Stat. § 658.295 (1987) is a regional and reciprocal interstate banking statute that permits a bank holding company to acquire a Florida bank *only if* (i) the bank holding company's principal place of business and more than 80 percent of the deposits of its subsidiary banks are located within a defined region consisting of Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia, and (ii) the bank holding company's home state (if other than Florida) provides reciprocal acquisition privileges to Florida bank holding companies. This Court upheld the validity of this type of state statute in Northeast Bancorp v. Board of Governors, 472 U.S. 159 (1985).

Prior to August 10, 1987, Section 2(c) of the BHC Act defined "bank" to include any institution that (i) accepted deposits that the depositor had a legal right to withdraw on demand, *and* (ii) engaged in the business of making commercial loans.[24] Because Fla. Stat. § 664.08(1) prohibits ISBs from accepting demand deposits, the Court of Appeals held in its original opinion that a Florida ISB must *always* be treated as a "non-bank" for purposes of the BHC Act. Relying on this Court's decision in *BT Investment*, 447 U.S. at 42-49, the Court of Appeals held that Florida could not constitutionally decide to withhold ISB charters from out-of-state bank holding companies.[25]

However, the Competitive Equality Banking Act of 1987 ("CEBA") amended Section 2(c) of the BHC Act, effective August 10, 1987.[26] As a result of that amendment, the definition of "bank" in Section 2(c) has been expanded to include (subject to certain limited exceptions) every institution that accepts deposits insured by the FDIC.[27] Thus, by virtue of CEBA's expansion of the

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[24] *See Dimension*, 474 U.S. at 365-66.

[25] *Continental*, 827 F.2d at 1521-23, J.S. App. 17a-24a.

[26] Act of Aug. 10, 1987, *supra* note 18, § 101(a), 101 Stat. 554, *codified* at 12 U.S.C. § 1841(c) (Supp. V 1987).

[27] *See supra* note 18, and accompanying text. Section 2(c)(2), as amended by CEBA, contains certain exemptions from the definition of "bank." 12 U.S.C. § 1841(c)(2) (Supp. V 1987). Section 2(c)(2)(H) exempts a limited number of industrial loan companies and industrial banks from inclusion in the "bank" definition, if the industrial loan company or bank (i) is organized under the laws of a state which, as of March 5, 1987, had in effect or under consideration a statute that required or would require such institution to obtain FDIC insurance, or (ii) was in existence on March 5, 1987, and does not thereafter engage in any additional activities. 12 U.S.C. § 1841(c)(2)(H) (Supp. V 1987). Continental has acknowledged that Florida law does not require ISBs to maintain

"bank definition," the Douglas Amendment now bars Continental from establishing the proposed Savings Bank, an FDIC-insured ISB, in Florida.

B. Because Continental Has Not Shown that It Actually Will Apply to Establish an Uninsured ISB, this Case Is Moot.

In view of CEBA's amendment to the definition of "bank" under the BHC Act, Continental can no longer pursue its current application, which states that the Savings Bank will accept FDIC-insured deposits.[28] As Lewis pointed out in his petition for rehearing below, this case is moot because approval of Continental's application is barred by *federal* law (*viz.*, the Douglas Amendment). In its opinion on rehearing, the Court of Appeals implicitly recognized that Continental could no longer establish an FDIC-insured ISB, but refused to find the case moot.[29] Evidently, the Court of Appeals felt Continental *might* attempt to establish an *uninsured* ISB, although the Court acknowledged that "[w]e cannot now guess what the parties will do or not do as a result of the enactment of [CEBA]."[30]

While the Court of Appeals may have been uncertain concerning the intentions of Continental, it is now clear that Continental does *not* intend to establish an *uninsured* ISB. In its Motion to Dismiss or Affirm filed in this Court, Continental stated that it "*can* amend its application as a matter of right to delete any reference to FDIC insurance," but made *no* statement of its *actual intention*

FDIC insurance (Mot. to Dismiss or Affirm at 14-15), and of course its proposed ISB was not in existence on March 5, 1987. Continental's proposed ISB, therefore, does not qualify for the exclusion under Section 2(c)(2)(H).

[28] Application to Organize Continental Illinois Savings Bank of Dade County at A-29. Appendix at 12a. *See supra* notes 7 and 19, and accompanying text.

[29] *Continental*, 838 F.2d at 458 and n.1, J.S. App. 33a-34a.

[30] *Continental*, 838 F.2d at 458, J.S. App. 34a.

to do so.[31] Continental was similarly evasive in its response to the brief filed by the United States as *amicus curiae*. The United States pointed out that "Continental has carefully avoided making any representation that it plans to propose an ISB without FDIC insurance."[32] In reply, Continental offered the following cryptic statement in which, once again, it nowhere said that it *actually intends* to apply to establish an *uninsured* ISB:

> Continental represents that it intends to propose the creation of a Florida ISB subsidiary upon the successful conclusion of this litigation. *This representation is subject to the common sense qualification that conditions at that time warrant such proposals.*[33]

The completely speculative nature of Continental's interest in an uninsured ISB is further demonstrated by the statement that Continental "should be permitted *to evaluate [its] business opportunities in Florida* without the continued burden of unconstitutional barriers to interstate commerce."[34]

As the United States has pointed out, "it is open to substantial doubt" whether Continental or any other bank holding company would choose to establish an uninsured banking subsidiary.[35] Federal deposit insurance is commonly viewed as an essential protection that banking institutions must offer to attract depositors.[36] Virtually all banks currently are insured by the FDIC; uninsured banks hold less than 0.5% of the nation's bank deposits.[37]

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[31] Mot. to Dismiss or Affirm at 14 (emphasis added).

[32] United States Br. at 10.

[33] Response of Appellees to United States Br. at 3 (emphasis added).

[34] *Id.* (emphasis added).

[35] United States Br. at 10 n.7.

[36] E. Symons & J. White, *Banking Law* 42 (2d ed. 1984); Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 3 (1977).

[37] Conference of State Bank Supervisors, *A Profile of State-Chartered Banking* 13 and n.2 (1988) (citing FDIC Annual Report

In light of widespread public concern regarding the federal government's current efforts to restore a gravely impaired system of federal deposit insurance for thrift institutions, it is highly unlikely that the public would patronize a newly-established depository institution that *could not even offer federal deposit insurance.*[38]

There is a further reason why Continental in particular is unlikely to establish an uninsured ISB. In 1984, the FDIC provided $4.5 billion of assistance to Continental to prevent the failure of its principal subsidiary bank.[39] Thus, FDIC insurance has been critical to Continental's survival, and it is especially doubtful that the public would respond favorably to solicitations for deposits by an uninsured banking subsidiary of Continental.

In view of Continental's inability under the Douglas Amendment to establish an FDIC-insured ISB in Florida and its failure to demonstrate a firm intent to establish an uninsured ISB in Florida, this case clearly has become moot.[40] In arguing that the mootness doctrine should, nevertheless, not apply here, Continental evidently relies on the exception to that doctrine for cases that are "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). This Court, however, has consistently refused to apply that exception where, as here, the complaining party shows only a "speculative contingenc[y]" that it will again become subject to application of the challenged state law.[41] In such cases, avoidance of mootness has required a showing of "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." [42]

For example, in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 577-78 (1987), a legal dispute between a mining company and a state coastal management commission was determined not to be moot, because it was "likely" that the mining company would again submit mining plans over which the state commission would claim jurisdiction.[43] Continental has

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for year ended Dec. 31, 1987). There is, at present, only one uninsured depository institution in Florida.

[38] For example, public anxiety regarding the thrift crisis and the insolvent condition of the deposit insurance fund administered by the Federal Savings and Loan Insurance Corporation ("FSLIC") caused an unprecedented withdrawal of deposits totalling $28.5 billion from the nation's FSLIC-insured thrifts during the first 3 months of 1989. H.R. Rep. No. 54 (pt. 1), 101st Cong., 1st Sess. 304-05 (1989). Thus, it is uncertain that, were Continental to pursue an application to establish an *uninsured* ISB, it would be able to meet its commitment to demonstrate a "[r]easonable [p]romise of [s]uccessful [o]peration" referenced in its application. See Appendix at 2a.

[39] *See* I. Sprague, *Bailout: An Insider's Account of Bank Failures and Rescues* 149-212 (1986) (describing the imminent failure of Continental Illinois Bank in May of 1984 and its rescue by the FDIC and other federal agencies).

[40] This Court has repeatedly dismissed cases on grounds of mootness where, as here, the case became moot following the decision of a lower court. For example, in Deakins v. Monaghan, 484 U.S. 193 (1988), it was pointed out that "[i]t is not enough that

[41] Hall v. Beals, 396 U.S. 45, 49 (1969) (per curiam). *Accord, Murphy*, 455 U.S. at 482-84. *Cf.* O'Shea v. Littleton, 414 U.S. 488, 493-99 (1974) (case dismissed for failure to meet the requirement of "an actual case or controversy," when it was a matter of "speculation and conjecture" whether plaintiffs would actually become subject to the allegedly unlawful practices carried on by city and state officials) (quotes at 493, 497).

[42] *Murphy*, 455 U.S. at 482 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam)) (emphasis added).

[43] In its opinion in *California Coastal Comm'n*, this Court characterized the mining company's intentions as follows:

> Granite Rock stated . . . that *its "investments and activities* regarding its valid and unpatented mining claims *require continuing operation* beyond the present Plan of Operations," and that *it intended to conduct mining operations on the claim at issue* "as long as [Granite Rock] can mine an economically and valuable mining deposit under applicable federal laws."

California Coastal Comm'n., 480 U.S. at 578 (emphasis added).

controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Accord*, Honig v. Doe, 484 U.S. 305 (1988); Allee v. Medrano, 416 U.S. 802, 818 and n.12 (1974).

shown no such likelihood of a continuing controversy in this case.

Continental has also suggested that this case is not moot because *other* out-of-state bank holding companies might choose to establish uninsured ISBs in Florida if this Court affirms the decision below.[44] It is settled federal law, however, that the ability of other persons to make the same claim does not save a case from mootness *unless* the complaining party is acting, or seeking to act, as a class representative for those other parties.[45] No class action was filed here and Continental, therefore, lacks standing to assert the claims of other out-of-state bank holding companies.

In sum, Continental is now barred by federal law from pursuing its original application. There is no longer a "present, live controversy," because Continental has shown, at most, only "a mere physical or theoretical possibility" that it might decide to apply for authority to organize an *uninsured* ISB.[46] The Court of Appeals, therefore, erred on rehearing when it failed to dismiss

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[44] Mot. to Dismiss or Affirm at 15; Response to U.S. Br. at 3.

[45] *Murphy*, 455 U.S. at 481-83 (case declared moot where plaintiff had been convicted prior to the appeal of his constitutional claim for pretrial bail, and where plaintiff had not sought to represent a class of pretrial detainees); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (plaintiff's legal challenge to federal parole guidelines was not moot, despite plaintiff's release from prison, where plaintiff sought to represent a class of prisoners eligible for parole and appealed the District Court's denial of class certification); *Hall*, 396 U.S. at 48-50 (plaintiffs' challenge to former Colorado voter residency law was moot because they had already satisfied the challenged residency requirement and had no standing to act as class representatives for persons affected by a new residency law).

[46] *Hall*, 396 U.S. at 48; *Murphy*, 455 U.S. at 482. The only continuing interest shown by Continental in this case is its claim for attorneys' fees under 42 U.S.C. § 1988. That claim, by itself, is *not* sufficient to provide Continental with standing to maintain this case under Article III of the Constitution. Diamond v. Charles, 476 U.S. 54, 70-71 (1986).

this case as moot or to remand the case to the District Court for a determination of mootness.[47]

II. THE COURT OF APPEALS' INVALIDATION OF FLORIDA'S BAN ON NEW INDUSTRIAL SAVINGS BANKS REPRESENTS AN UNWARRANTED INTERFERENCE WITH THE STATE'S CHARTERING AUTHORITY AND IS BASED ON AN ERRONEOUS CONSTRUCTION OF THE COMMERCE CLAUSE.

A. The Decision Below Represents an Unwarranted Interference with Florida's Authority to Charter Domestic Corporations.

The decision below compels the Department to process Continental's application for an ISB charter despite the Florida Legislature's specific enactment, in Fla. Stat. § 664.02 (1987), that no new ISB charter shall be issued to any person. The terms of the decision are so broadly stated that they might be construed to require Florida *indefinitely* to process applications for ISB charters by any bank holding company from outside the Southeastern region.[48] Indeed, if the decision below is given this broad

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[47] As previously noted, the Court of Appeals stated that it was unable to "guess" what Continental might do in response to CEBA's amendment of the definition of "bank." *See* note 30, *supra*, and accompanying text. In such circumstances, this Court has held that the proper course is to remand the case to the District Court for a determination of the mootness issue. *BT Investment*, 447 U.S. at 51-53 (remand necessary where it appeared that Bankers Trust's application to establish a Florida trust company was temporarily barred by a recent change in federal law). *See also* Fusari v. Steinberg, 419 U.S. 379, 386-90 (1975) (remand necessary to consider legal impact of recent amendments to challenged Connecticuit statute that regulated eligibility for unemployment compensation).

Of course, this Court has not hesitated to make the determination of mootness itself where that conclusion was mandated by counsel's representations in briefs or at oral argument. *Deakins*, 108 S.Ct. at 528 and n.3.

[48] In an effort to clarify the scope of the decision below, Lewis requested that the Court of Appeals explain, on rehearing, whether

application, the Equal Protection Clause of the Fourteenth Amendment might compel Florida to process applications for ISB charters even if submitted by Florida residents. In any event, the practical effect of the Court of Appeals' decision is to deprive Florida of its authority to determine whether it wishes to grant any further charters for this type of financial institution.

The appealed decision thus creates an unwarranted—and unprecedented—interference with a state's authority to adopt uniform regulations for the chartering and governance of banking institutions and other corporations. Clearly, the Court of Appeals "failed to appreciate the significance for Commerce Clause analysis of the fact that . . . [Florida ISBs are] entities whose very existence and attributes are a product of state law." *CTS Corp.*, 481 U.S. at 89. Throughout its history, this Court has recognized the plenary authority of each state to determine the conditions under which it will charter corporations. In an early opinion by Chief Justice John Marshall, this Court declared that a corporation is "the mere creature of the act to which it owes its existence" and is "capable of exerting its faculties only in the manner which that act authorizes."[49] This fundamental principle has been reiterated in many subsequent cases.[50]

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its ruling concerning Fla. Stat. § 664.02 applied *only* to Continental's application or whether it would *also* apply to future applications for ISB charters by other out-of-state bank holding companies. The Court of Appeals, however, in its opinion denying rehearing, failed to clarify the scope of its ruling. *See Continental*, 838 F.2d at 458, J.S. App. 32a-34a.

[49] Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 167 (1804).

[50] *E.g.*, Oregon Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U.S. 1, 20-21 (1889) ("[a] corporation in this country . . . can only have an existence under the express law of the State or sovereignty by which it is created . . . [and] can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter"); Cort v. Ash., 422 U.S. 66, 84 (1975) ("[c]orporations are creatures of state law"); Santa Fe Industries v. Green, 430 U.S. 462, 479 (1977) (same); *CTS Corp.*, 481 U.S. at 94 ("the corporation . . . owes its existence and attributes to state law").

This Court has further recognized that a state may constitutionally decide to alter or rescind its previous exercise of chartering authority. For example, in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120 (1937), this Court declared:

> *How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. . . .* The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. *And it will hardly be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.*[51]

Similarly, in *Calder v. Michigan*, 218 U.S. 591 (1910), in upholding the repeal of a corporate charter pursuant to authority reserved by the Michigan Legislature, this Court declined to examine the "method or motives" of the legislature in exercising that power, even though plaintiffs alleged that the repeal was discriminatory and anticompetitive.[52] In the case of ISBs as with other corporations, the Florida Legislature (like the Michigan Legislature in *Calder*) has expressly reserved authority to

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[51] *Chicago Title & Trust Co.*, 302 U.S. at 127-28 (emphasis added; citations omitted) (holding that a dissolved Illinois corporation had no power to file a federal bankruptcy petition beyond the two-year period following dissolution that was specified by Illinois corporation statutes, since no corporation can extend its life beyond the limit established by its chartering authority).

[52] *Calder*, 218 U.S. at 598 (opinion for the Court by Holmes, J.).

"amend, repeal, or modify . . . at pleasure" its laws relating to corporate chartering and governance.[53]

In addition to the deference accorded to state chartering of corporations, federal law has shown a particular solicitude for state regulation of banking institutions. In both *Northeast Bancorp* and *BT Investment*, this Court declared that the regulation of financial institutions is a matter of "profound local concern." [54] After reviewing the history of congressional authorization of state regulation in the areas of bank branching and bank holding company expansion, *Northeast Bancorp* explicitly recognized "the broader purposes underlying the [BHC Act] as a whole and the Douglas Amendment in particular to retain local, community-based control over banking." [55]

An example of congressional deference to state regulation of financial institutions is Section 7 of the BHC Act, which reserves to each state the power to regulate bank holding companies and their subsidiaries. As stated in *BT Investment*, 447 U.S. at 48-49, Section 7 does not authorize the states to discriminate against interstate commerce, but it does empower them to adopt evenhanded regulations concerning bank holding companies that are "more restrictive" than the BHC Act. It has been held, for example, that Section 7 allows each state to prohibit bank holding companies entirely,[56] or to prohibit all in-state and out-of-state bank holding companies from engaging in a bank-related activity that would otherwise be permissible under the BHC Act.[57]

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[53] Fla. Stat. §§ 607.411, 658.30(1)(a), and 664.03(4) (1987).

[54] *Northeast Bancorp*, 472 U.S. at 177 (quoting *BT Investment*, 447 U.S. at 38).

[55] *Northeast Bancorp*, 472 U.S. at 172.

[56] Commercial Nat'l Bank v. Board of Governors, 451 F.2d 86, 89 (8th Cir. 1971). *See also* Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 418-19 and n.5 (1965).

[57] Florida Ass'n of Ins. Agents, Inc. v. Board of Governors, 591 F.2d 334, 336-39, 342-43 (5th Cir. 1979) (in view of Section 7, Federal Reserve Board determinations under Section 4(c)(8) of the BHC Act, regarding the permissibility of bank-related activities, must comply with a Florida statute prohibiting all bank holding companies from engaging in specified insurance activities). *Accord*, Independent Ins. Agents of America, Inc. v. Board of Governors, 736 F.2d 468, 476 (8th Cir. 1984).

In this case, the Florida Legislature, acting in accordance with its reserved authority over ISBs and other Florida corporations,[58] has expressly declared in Fla. Stat. § 664.02 (1987) that Florida will no longer issue ISB charters *to any person*. This evenhanded exercise of chartering power with respect to a class of state-created financial institutions is plainly within the realm of state power over corporate governance and banking regulation. Because, as shown below, Fla. Stat. § 664.02 does not unlawfully discriminate against or place an undue burden on interstate commerce, the Court of Appeals clearly erred in refusing to uphold the statute.

B. Fla. Stat. § 664.02 Does Not Discriminate Against Interstate Commerce.

1. *The Statute Evenhandedly Prohibits the Further Issuance of ISB Charters to any Person.*

Florida's ban on further ISB charters, as stated in Fla. Stat. § 664.02, is nondiscriminatory both in its terms and practical effect. The statute's express terms prohibit the granting of a new ISB charter to any in-state or out-of-state resident. Thus, like the Indiana statute upheld in *CTS Corp.*, Fla. Stat. § 664.02 does not violate the Commerce Clause because it "visits its effects equally upon both interstate and local business." [59]

The Court of Appeals held that, despite the statute's "facial neutrality," Florida's ban on further ISB charters discriminated against out-of-state bank holding companies in its practical effect. The Court of Appeals reasoned that out-of-state, extra-regional bank holding companies

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[58] *See supra* note 53, and accompanying text.

[59] *CTS Corp.*, 481 U.S. at 87 (quoting *BT Investment*, 447 U.S. at 36).

would be more likely than Florida bank holding companies to seek ISB charters because they are not permitted to establish "traditional" banks in Florida.[60] As shown below, however, the "discrimination" identified by the Court of Appeals is the result of federal law—*viz.*, the Douglas Amendment—and *not* Fla. Stat. § 664.02.[61] It is clear that Fla. Stat. § 664.02 makes no distinction among in-state and out-of-state bank holding companies or among any other groups of persons. All are equally barred from obtaining any new ISB charters.

Even if, as the Court of Appeals contended, more out-of-state bank holding companies could be expected to seek ISB charters, that fact would not establish a violation of the Commerce Clause. As this Court held in *Exxon* and *CTS Corp.*, "the [Commerce] Clause protects the interstate market, not particular interstate firms," and, therefore, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." [62] Fla. Stat. § 664.02 meets the critical test articulated by this Court—*viz.*, that "nothing in [Section 664.02] imposes a greater burden on out-of-state [bank holding companies] than it does on similarly situated [Florida bank holding companies]." *CTS Corp.*, 481 U.S. at 88. Because all persons are equally prohibited from acquiring ISB charters, there is neither facial nor practical discrimination under this statute.[63]

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[60] *Continental*, 827 F.2d at 1520-23, J.S. App. 14a-24a.

[61] *See infra* Argument, Part II(B)(2).

[62] *Exxon*, 437 U.S. at 127, 126; *CTS Corp.*, 481 U.S. at 88.

[63] Fla. Stat. § 664.02 (1987) is entirely distinguishable from the Florida statute—former Fla. Stat. § 659.141(1)—which was invalidated in *BT Investment*. Unlike Section 664.02, former Section 659.141(1), added by 1972 Fla. Laws 72-96 § 1, prohibited *only out-of-state* bank holding companies from establishing an investment advisory business in Florida. Thus, former Section 659.141(1) was discriminatory in both its terms and practical effect. *See BT Investment*, 447 U.S. at 37-44.

2. *The Discrimination Identified by the Court of Appeals Is the Result of the Douglas Amendment, not Fla. Stat. § 664.02.*

The Court of Appeals' key finding of discrimination, on which its Commerce Clause analysis rested, was that the "practical effect" of Fla. Stat. § 664.02 would be to prevent extra-regional, out-of-state bank holding companies from obtaining access to Florida deposits. The Court of Appeals argued that this disparate impact would occur because bank holding companies from Florida and the Southeastern region, though barred from obtaining ISB charters, would be able to solicit Florida deposits by acquiring "traditional" Florida banks, while extra-regional bank holding companies were prevented from acquiring such institutions by the Douglas Amendment.[64]

Thus, the *only* discrimination identified by the Court of Appeals is that Continental and other extra-regional bank holding companies may not gain access to Florida deposits through ownership of "traditional" Florida banks, while bank holding companies in the Southeastern region can do so under the Douglas Amendment and Fla. Stat. § 658.295.[65] This alleged discrimination, however, is the result of *federal* law (*viz.*, the Douglas Amendment), *not* Fla. Stat. § 664.02. Because federally authorized discrimination cannot be challenged under the Commerce Clause (*Northeast Bancorp*, 472 U.S. at 174-75), the Court of Appeals plainly erred in using Florida's *lawful* discrimination with respect to ownership of "traditional" banks as the basis for invalidating its *nondiscriminatory* statute as to the chartering of ISBs.

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[64] *Continental*, 827 F.2d at 1522 and n.6, J.S. App. 20a-21a. The Court of Appeals was mistaken in its assertion that Fla. Stat. § 664.02 *completely* bars extra-regional bank holding companies from gaining access to Florida deposits. *See infra* notes 84-87 and accompanying text.

[65] *See supra* notes 2-4 and 23, and accompanying text.

3. *The Court of Appeals' Finding of Discrimination Was Based on an Erroneous Definition of the Relevant Line of Commerce.*

The Court of Appeals further erred in basing its finding of discrimination on a definition of the relevant line of commerce that was *different* from the market actually regulated by Fla. Stat. § 664.02. As the United States has pointed out in its *amicus* brief on jurisdiction, the Court of Appeals "evaluated the effect of [Section 664.02] not only on ISBs (*the sole subject of the facially evenhanded statute*) but also on the remainder of what it determined to be the actual market," namely, all "deposit-taking institutions." The United States suggested that this Court should "address fully" whether it was proper for the Court of Appeals to base its decision "on an examination of markets *broader than those described by the terms of the challenged state measure*." [66]

The Court of Appeals' broad definition of the relevant market was a misapplication of the Commerce Clause for two reasons. First, as already shown, the *only* discrimination identified by the Court with respect to Florida's regulation of deposit-taking institutions (*viz.*, the prohibition against acquisitions of "traditional" Florida banks by extra-regional, out-of-state bank holding companies) has been authorized by the Douglas Amendment.[67] Second, the approach taken by the Court of Appeals is fundamentally inconsistent with this Court's decision in *Exxon*. In that case a Maryland statute prohibiting producers and refiners of gasoline from operating retail service stations within the state was upheld under the Commerce Clause even though, as there were no Maryland producers or refiners, its impact fell *exclusively* on out-of-state entities. The Court emphasized that the challenged statute's provisions applied neutrally to *all* producers and refiners regardless of their place of

[66] United States Br. at 16-17 (emphasis added).

[67] *See supra* Argument, Part II(B)(2).

origin and did nothing to restrict entry by out-of-state retailers that were not affiliated with producers or refiners. *Exxon*, 437 U.S. at 125-28.

The majority in *Exxon* rejected the argument that the Maryland statute should be invalidated under a market definition *different* from the line of commerce regulated by the terms of the statute. It had been argued that the Maryland statute actually discriminated in the "retail market" by protecting local independent gasoline dealers from competition by "integrated" dealers owned by out-of-state producers and refiners.[68] Even though the statute *did* prevent entry into the retail market by integrated dealers, the majority in *Exxon* refused to redefine the relevant market and found that the statute did *not* discriminate in the market regulated by the statute's own terms, *i.e.*, the market for producers and refiners.[69]

Section 664.02, Florida Statutes, regulates in precisely the same evenhanded fashion as the Maryland statute upheld in *Exxon*. It uniformly applies to all persons seeking new charters for ISBs, and, as shown below, it allows a large volume of banking services (including deposit services) to flow across Florida's borders.[70] Thus, to find that Fla. Stat. § 664.02 was discriminatory, the Court of Appeals redefined the relevant market from that regulated by the statute (*viz.*, ISB charters) to the much broader market for deposit services, an approach that was plainly contrary to the correct application of the Commerce Clause established in *Exxon*.

[68] *See Exxon*, 437 U.S. at 125-29 (majority opinion); *id.* at 137-40 (Blackmun, J., dissenting as to the Court's Commerce Clause holding).

[69] *Exxon*, 437 U.S. at 125-29. *See also BT Investment*, 447 U.S. at 42 (stating that "[t]he absence of . . . discrimination between interstate and local producer-refiners was a most critical factor in *Exxon*").

[70] *See infra* notes 81-87, and accompanying text.

4. *Fla. Stat. § 664.02 Was Enacted for a Valid, Non-Protectionist Purpose.*

In addition to its mistaken finding of discriminatory impact, the Court of Appeals erred in concluding that Fla. Stat. § 664.02 had a "protectionist" purpose—*viz.*, "to protect Florida banks from competition by financial institutions owned by out-of-state holding companies." [71] Contrary to this reading by the Court of Appeals, the *actual* reason for enactment of the statute, as revealed in the legislative history quoted by the Court, was the Florida Legislature's "growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking." [72] The passage of Fla. Stat. § 664.02

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[71] *Continental*, 827 F.2d at 1521, J.S. App. 17a.

[72] Committee on Commerce, Fla. House of Representatives, Final Staff Summary of HB 801, May 31, 1984, J.A. at 28, 31 (quoted in *Continental*, 827 F.2d at 1521, J.S. App. 16a). The remainder of the legislative staff report quoted by the Court of Appeals (*id.*, J.S. App. 16a-17a) reads as follows:

> Two years ago, the legislature imposed a one-year moratorium on the issuance of new ISB charters pending the outcome of litigation over the application of Continental Illinois Corporation to establish ISBs in Florida. A federal court in Florida has now ruled in favor of Continental Illinois, and in the wake of that decision both Citicorp and BankAmerica Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.
>
> Accordingly, except for a temporary charter issued to facilitate a cross-industry conversion, merger, or acquisition, section 34 of the bill prohibits the issuance of any new industrial savings bank charters thus limiting the number of ISBs to the three that currently exist.

It is noteworthy that this staff report nowhere states that the "purpose" of Section 664.02 is "to protect Florida banks from competition." In fact, the Florida Legislature had just a few weeks before enacted Fla. Stat. § 658.295 to *promote* interstate acquisitions by Southeast regional bank holding companies. *See supra*

in June 1984 was plainly intended to protect the integrity of Florida's regional banking statute, Fla. Stat. § 658.295, which had been enacted just a few weeks earlier.

Florida's regional banking program was carefully designed to enable the state to make an orderly and constructive transition from single-state to interstate banking. The purposes of this regional approach were (i) to ensure that the providers of credit in Florida would be responsive to the credit needs of Florida businesses and consumers, and (ii) to allow the expansion of local and regional financial institutions so that they could effectively compete with large "money center" financial institutions and thereby preserve a competitive banking environment in Florida.[73] In *Northeast Bancorp*, this Court expressly affirmed the legitimacy of these state objectives in upholding the constitutionality of similar state regional banking statutes.[74]

Florida reasonably believed in 1984 that its carefully planned regional banking approach would be seriously undermined if extra-regional bank holding companies

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notes 4 and 23 and accompanying text. Moreover, as explained in Argument, Part II(D), *infra*, the enactment of Section 664.02 had no effect on the provision of a large volume of banking services in Florida by subsidiaries of out-of-state bank holding companies, including Continental.

[73] *Report of the Governor's Committee to Examine the Implications for Florida of Regional Interstate Banking*, Feb. 10, 1984 (the "*Governor's Committee Report*") at 4-5 (quoting report from Prof. Arnold A. Heggestad); *Interstate Bank Expansion: Market Forces and Competitive Realities: The Report of the Florida Interstate Banking Study Group*, Jan. 1984 (the "*Interstate Banking Study Group Report*") at 7, 231. The *Interstate Banking Study Group Report* was presented to and relied on by the Governor's Committee (*see Governor's Committee Report* at 6). The recommendations contained in the *Governor's Committee Report* were embodied in Fla. Stat. § 658.295. *See* Committee on Commerce, Fla. House of Representatives, Final Staff Summary of CS/HB 795, May 22, 1984, at 5.

[74] *Northeast Bancorp*, 472 U.S. at 165, 172-73, 177-78.

could evade both the Douglas Amendment and Fla. Stat. § 658.295 by acquiring FDIC-insured banking institutions in Florida that were then being treated as "nonbank banks" under the BHC Act.[75] Indeed, in enacting CEBA in 1987, Congress found it necessary to close the "nonbank bank loophole" in the BHC Act by expanding the definition of "bank" in Section 2(c) to include *all* FDIC-insured institutions. In taking this action, Congress declared that the "loophole" was contrary to the intent of the BHC Act because, *inter alia*, it had permitted a "circumvent[ion]" and "subver[sion]" of the Douglas Amendment and state regional banking laws by bank holding companies.[76]

In view of the threatened subversion of the Douglas Amendment and Fla. Stat. § 658.295 by the "nonbank bank" device, Florida was not constitutionally required to facilitate the erosion of its regional banking program by continuing to grant charters for ISBs. The Commerce Clause surely would not have required Florida to

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[75] "Nonbank banks" were institutions (usually FDIC-insured) that either did not accept demand deposits or did not make commercial loans and thereby escaped coverage under the pre-1987 definition of "bank" in Section 2(c) of the BHC Act. *See Dimension*, 474 U.S. at 363-64, 366-67.

In 1985 and 1986 a panel of the Court of Appeals *twice* determined that the acquisition of deposit-taking "nonbank banks" in Florida by extra-regional bank holding companies consituted an "evasion" and "clearly frustrate[d]" the purpose of the Douglas Amendment. The panel ultimately felt constrained, however, to permit such acquisitions in view of this Court's decision in *Dimension*. Florida Dept. of Banking and Finance v. Board of Governors, 760 F.2d 1135, 1143 (11th Cir. 1985), *vacated and remanded sub nom.* U.S. Trust Corp. v. Board of Governors, 474 U.S. 1098 (1986), *on remand sub nom.* Florida Dept. of Banking and Finance v. Board of Governors, 800 F.2d 1534, 1537 (11th Cir. 1986), *cert. denied sub nom.* Conference of State Bank Supervisors v. Board of Governors, 481 U.S. 1013 (1987).

[76] S. Rep. No. 19, 100th Cong., 1st Sess. 5-7 (1987), *reprinted in* 1987 U.S. Code Cong. & Admin. News 489, 495-97; 133 Cong. Rec. S3800-01 (daily ed. Mar. 25, 1987) (remarks of Sen. Proxmire, Senate floor manager for CEBA).

charter a *new* form of deposit-taking "nonbank bank" to hasten the demise of its regional banking experiment.[77] For the same reason, Florida's decision to bar the further chartering of ISBs, in order to preserve its procompetitive first step toward interstate banking, must be viewed as valid, nonprotectionist legislation.[78]

The Court of Appeals' finding of both practical and purposive discrimination with respect to Fla. Stat. § 664.02 is contrary to an analogous decision of the Second Circuit Court of Appeals, upholding Conn. Gen. Stat. § 36-5a, in *Sears, Roebuck and Co. v. Brown*, 806 F.2d 399 (2d Cir. 1986). The Connecticut statute at issue in *Sears* prohibited any bank or savings association or holding company thereof from opening an office providing "deposit services" in Connecticut, but the statute did not apply this prohibition to banks or savings associations chartered or headquartered in Connecticut. Sears claimed that Section 36-5a violated the Commerce Clause by discriminating against out-of-state financial institutions and holding companies. In rejecting this challenge, the Second Circuit concluded that Section 36-5a (like Fla.

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[77] The United States apparently agrees that Florida was not required to take such action. United States Br. at 17.

[78] In enacting CEBA, Congress noted that a number of states had enacted regional banking statutes that were "carefully drafted to permit regional banks to grow in size before taking on the full competitive onslaught of the major money center banks." Congress decided "to close the nonbank bank loophole" because it recognized that "[t]hese carefully designed regional timetables can be easily circumvented if the major money center banks are free to penetrate regional banking markets through nonbank banks irrespective of State law." *See supra* note 76, S. Rep. No. 19 at 7, 1987 U.S. Code Cong. & Admin. News at 497. Thus, Florida's even-handed action in Fla. Stat. § 664.02 to prevent evasion of its regional banking statute fully accords with congressional policy, and " 'whatever effect the operation of [Fla. Stat. § 664.02] may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage . . . .' " Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 109 S.Ct. 1262, 1281 (1989) (quoting Parker v. Brown, 317 U.S. 341, 368 (1943)).

Stat. § 664.02) treated all in-state and out-of-state holding companies alike, and that the statute's discrimination in favor of Connecticut banks and savings associations had been authorized by the Douglas Amendment and other provisions of federal law. *Sears*, 806 F.2d at 408-09.

In addition, the Second Circuit held that the legislative history of Section 36-5a did not reveal any "protectionist intent." *Id.* at 406-08. The Second Circuit pointed out that Section 36-5a was enacted in conjunction with Connecticut's adoption of a regional interstate banking law, which *"was not an action suggesting a protectionist purpose."* *Id.* at 407 (emphasis added). Further, the Second Circuit found that Connecticut's adoption of Section 36-5a was motivated by a "substantial legitimate local concern." Noting that the Connecticut Legislature was aware that extra-regional bank holding companies might establish "non-bank banks" in an effort to evade Connecticut's regional statute, the Second Circuit concluded that Section 36-5a was an appropriate response to a "perceived crisis in the banking industry, the onslaught of non-bank banks and the increasingly likely prospect of interstate banking." [79]

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[79] *Sears*, 806 F.2d at 409. *See also id.* at 407-08 (Connecticut legislation was designed to enable the state to "effectively deal with the regulation of banking in Connecticut during a volatile period of nationwide transition in the banking industry").

In Chemical New York Corp., 73 Fed. Res. Bull. 609 (1987), *appeal pending sub nom.* Lewis v. Board of Governors, No. 87-3455 (11th Cir.), the Federal Reserve Board refused, *prior* to the enactment of CEBA, to give effect to Fla. Stat. § 658.296, which prohibits any in-state or out-of-state company from acquiring any FDIC-insured institution that is not a "bank" for purposes of the BHC Act. The Board stated that this prohibition was discriminatory as applied to extra-regional bank holding companies, although it conceded (citing *Sears*) that Section 658.296 was *not* discriminatory as applied to any *other* company. *See* 73 Fed. Res. Bull. at 610-11, 613-14. Lewis has appealed the Board's decision and the Court of Appeals has stayed that appeal (with the consent of the parties) pending the final resolution of this case.

The Second Circuit's reasoning in *Sears* is precisely applicable to this case, where Fla. Stat. § 664.02 (like Conn. Gen. Stat. § 36-5a) was enacted to prevent a clear threat of evasion of a regional interstate banking program authorized under the Douglas Amendment. The Second Circuit's reasoning was based on and fully comports with this Court's decisions in *Exxon* and *Northeast Bancorp* and should be applied here.

C. The Florida Statute Does Not Subject Activities in Interstate Commerce to Conflicting Regulations.

Florida's prohibition against any further charters for ISBs applies *only* to corporations that *Florida* has authority to charter. Section 664.02 does not attempt to regulate the chartering of any out-of-state corporation, nor does any other state have the right to regulate the chartering of Florida ISBs. As this Court recognized in *CTS Corp.*, 481 U.S. at 89, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." There is no risk of conflict among the states in chartering corporations so long as each state (as Florida has done here) "regulates [chartering] rights only in the corporations it has created." *Id.* Thus, because Fla. Stat. § 664.02 "does not create an impermissible risk of inconsistent regulation [of corporate chartering] by differing States," it does not violate the Commerce Clause. *Id.*[80]

D. The Florida Statute Does Not Impose an Undue Burden on Interstate Commerce.

Section 664.02 operates *only* to bar the issuance of a new ISB charter to any in-state or out-of-state person. The statute has, at most, an incidental impact on interstate commerce, because it does not interfere with the large volume of banking services that flow across Florida's

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[80] Similarly, because Fla. Stat. § 664.02 regulates only the chartering of Florida ISBs, it does not "impos[e] controls on a commercial activity of such an essentially interstate character that it is not amenable to state regulation." *Exxon*, 437 U.S. at 125.

borders. As described above, Fla. Stat. § 658.295 allows bank holding companies from eleven other Southeastern states and the District of Columbia, under specified conditions, to acquire and operate banks in Florida.[81] Even extra-regional bank holding companies that are forbidden by the Douglas Amendment from acquiring Florida banks may, nevertheless, provide a wide variety of financial services to Florida residents. For example, at the time of enactment of Florida's ban on new ISB charters, out-of-state banks and bank holding companies operated more than 400 offices in Florida offering various banking services. Continental itself operated four subsidiaries in Florida providing trust, leasing, and financial advisory services pursuant to Section 4(c)(8) of the BHC Act.[82] Continental also operated an "Edge Act" corporation, and its Illinois national bank subsidiary operated a loan production office in Florida.[83] Moreover, out-of-state bank holding companies were soliciting deposits from Florida residents by mail and through securities brokerage firms.[84] The 1984 amendment to Fla. Stat. § 664.02 had no effect on any of these interstate banking services.

[81] *See supra* notes 4 and 23, and accompanying text.

[82] Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8) (Supp. V 1987), authorizes bank holding companies to engage, through nonbanking subsidiaries, in activities that the Federal Reserve Board has determined, by regulation or order, to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto." *See* 12 C.F.R. §§ 225.21-225.25.

[83] An "Edge Act" corporation is an organization authorized to engage in international-related and wholesale banking services pursuant to 12 U.S.C. §§ 611-32 (1982 & Supp. V 1987). For the powers of Edge Act corporations, *see* 12 U.S.C. § 615 (1982) and 12 C.F.R. § 211.4. A loan production office is an office of a national bank that is authorized to solicit customers for loans (but not to approve or disburse loans). *See* 12 C.F.R. § 7.7380.

[84] The information in this paragraph concerning the 1984 activities of out-of-state bank holding companies (including Continental) is drawn from the *Interstate Banking Study Group Report*, *supra* note 73, at 31-34, 69-95, 104 and 124. Specific information with respect to Continental's activities in Florida is set forth at 79, 82, 87 and 91.

Additionally, under federal statutes authorizing out-of-state bank holding companies to make emergency acquisitions of failed banks and savings associations, two extra-regional (New York) bank holding companies have acquired large depository institutions in Florida. In January 1984, Citicorp acquired a failed Miami savings association with nearly $2 billion in assets, pursuant to 12 U.S.C. § 1730a(m).[85] In February 1986, Chase Manhattan Corporation acquired a failed St. Petersburg bank with $600 million in assets, pursuant to 12 U.S.C. § 1823(f).[86] The Court of Appeals, therefore, was incorrect when it stated that Fla. Stat. § 664.02 "erect[ed] an insurmountable barrier to the market of Florida deposits by out-of-state bank holding companies."[87] Section 664.02 does *not* prevent extra-regional bank holding companies from soliciting deposits in Florida by mail or through brokers or from making emergency acquisitions of failed depository institutions in Florida.

Thus, it is clear that Fla. Stat. § 664.02 has not placed an undue burden on interstate commerce and, therefore, satisfies the test applied in *CTS Corp.*, 481 U.S. at 89-94, and *Exxon*, 437 U.S. at 125-29. Even if this Court deems it necessary to apply the balancing test set forth in *Pike v. Bruce Church, Inc.*,[88] the incidental effect of Section

[85] Citicorp (New Biscayne), 70 Fed. Res. Bull. 157 (1984) (approving acquisition by Citicorp under Section 4(c)(8) of the BHC Act).

[86] Chase Manhattan Corp. (Park Bank), 72 Fed. Res. Bull. 350 (1986); 46 BNA Washington Financial Rep. 299 (1986). 12 U.S.C. § 1823(f) (1982 & Supp. V 1987) creates a limited exception to the Douglas Amendment's general prohibition against interstate bank acquisitions by bank holding companies without state authorization. *See* 12 U.S.C. § 1842(d) (1982).

[87] *Continental*, 827 F.2d at 1522, J.S. App. 20a. The United States has committed the same factual error. *See* U.S. Br. at 14-15.

[88] 397 U.S. 137 (1970). In *Pike*, it was held that if a state statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

664.02 on interstate commerce would unquestionably be outweighed by the legitimate state purposes accomplished by the statute.[89] Moreover, in a case like this one, where the states have been accorded substantial deference in regulating the chartering and governance of banking institutions and other corporations,[90] this Court has held that such a reservation of state authority should not be "render[ed] meaningless" by a broad application of the Commerce Clause that places excessive weight on the fact that a challenged state law has "some effect on interstate commerce." [91]

Thus, Continental and other extra-regional bank holding companies have been able to enter Florida and provide extensive financial services to Florida residents through hundreds of offices without interference from Florida's evenhanded prohibition of new ISB charters.[92]

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[89] For a discussion of the valid state purposes underlying Fla. Stat. § 664.02, *see supra* Argument, Part II(B)(4). This Court did *not* apply the *Pike* balancing test in *CTS Corp.* or *Exxon*. Indeed, Justice Scalia's concurring opinion in *CTS Corp.*, 481 U.S. at 95-96, expressly *rejected* the balancing test. Commentators have suggested that, in view of *CTS Corp.*, the *Pike* balancing test is not applicable to a case such as this one, where the challenged state statute regulates the chartering or governance of corporations. *E.g.*, *Cox, The Constitutional "Dynamics" of the Internal Affairs Rule—A Comment on CTS Corporation*, 13 J. Corp. L. 317, 360-61 (1988); Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 Harv. L. Rev. 96, 103-04 and n.45 (1987).

[90] *See supra* notes 49-57, and accompanying text.

[91] *Northwest Cent. Pipeline*, 109 S.Ct. at 1281. *Accord, CTS Corp.*, 481 U.S. at 89-90, 94 (state laws regulating corporate governance are valid, even though "such laws necessarily affect certain aspects of interstate commerce," so long as residents and nonresidents have "equal access" to corporate privileges).

[92] The extensive opportunities for out-of-state bank holding companies to provide banking services in Florida, despite the prohibition against new ISB charters, plainly distinguishes Fla. Stat. § 664.02 from the North Carolina statute struck down in Best & Co. v. Maxwell, 311 U.S. 454 (1940), on which the Court of Appeals particularly relied. *See Continental*, 827 F.2d at 1522, J.S. App. 22a-23a. In *Maxwell*, the challenged state law required any person other than a resident retail merchant to pay a substantial franchise tax before displaying samples in a rented house or hotel room. This Court struck down the statute because there was no practical way for nonresident merchants to display goods in North Carolina without paying the tax.

While out-of-state bank holding companies, like their in-state competitors, may no longer establish Florida ISBs—a single type of financial institution—this Court has repeatedly rejected the " 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market.' " [93] The Commerce Clause does not require Florida to define the chartering rights for ISBs in the same way that any other state may have done. Florida need only provide that "residents and nonresidents have equal access" to ISB charters, and Florida has done so by providing that no person may obtain any further ISB charters.[94]

III. CONTINENTAL IS NOT ENTITLED TO ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 BECAUSE IT HAS VINDICATED NO RIGHT ACTIONABLE UNDER 42 U.S.C. § 1983 AND IS NOT A PREVAILING PARTY.

This case also presents the issue of whether a claim for violation of the dormant Commerce Clause is cognizable under 42 U.S.C. § 1983. Because such a claim is precluded by the plain meaning and manifest intent of § 1983, the decision below awarding attorneys' fees on appeal, evidently pursuant to 42 U.S.C. § 1988, was erroneous.[95] Furthermore, even if the claim falls under

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[93] *CTS Corp.*, 481 U.S. at 93-94 (quoting *Exxon*, 437 U.S. at 127).

[94] *CTS Corp.*, 481 U.S. at 94.

[95] *Continental*, 838 F.2d at 458, J.S. App. 36a. Continental has suggested that the Court of Appeals may have awarded attorneys' fees as a sanction against Lewis under 28 U.S.C. § 1927. *See* Motion to Dismiss or Affirm at 20. This suggestion is unsupported by the record, which reveals no finding by the Court of Appeals that Lewis

the terms of Section 1983, Continental is not a prevailing party entitled to relief under § 1983 because it has failed to obtain any of the relief that it sought from appellant Lewis.

A. Application of Section 1983 to Redress Violations of the Dormant Commerce Clause Is Contrary to Precedent and Supported Neither by Its Plain Meaning nor the Intent of Congress.

The Court of Appeals' allowance of Continental's attorneys' fees on appeal under 42 U.S.C. § 1988 necessarily assumed that the Commerce Clause violations found by its opinion were actionable under 42 U.S.C. § 1983.[96] As three members of this Court have recognized, however, "the weight of authority" supports the conclusion that claims arising under the Commerce Clause are not cognizable in an action under 42 U.S.C. § 1983.[97] Based on a review of the statutory language, congressional intent, judicial interpretations, and considerations of public policy, it is clear that the Commerce Clause does not grant to private parties such as Continental any right, privilege or immunity secured by the Constitution within the meaning of Section 1983.

"unreasonably and vexatiously" multiplied proceedings on appeal, nor any grounds for such a finding.

[96] Continental has also suggested that the Court of Appeals could have based its fee award on due process grounds. *Id.* As pointed out in United States Br. at 20, however, that ground is precluded by Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), and Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) due to the absence of extra-territorial effect of the challenged Florida legislation.

[97] Private Truck Counsel of America, Inc. v. Quinn, 476 U.S. 1129 (1986) (White, J., dissenting from denial of certiorari). Justice White, joined by Justices Brennan and O'Connor, argued for resolution of an apparent conflict among the circuits indicated by Kennecott Corp. v. Smith, 637 F.2d 181, 186 n.5 (3d Cir. 1980) in contrast to "the weight of authority" holding that a violation of the Commerce Clause is not cognizable in an action under Section 1983.

1. *The Dormant Commerce Clause Does Not Create a Right, Privilege, or Immunity Secured by the Constitution.*

A claim that a state action violated the dormant Commerce Clause clearly does not state any claim for "the deprivation of any rights, privileges or immunities secured by the Constitution . . . to any citizen or other person" as required by Section 1983. The language of the Commerce Clause, at Article I, § 8, cl. 3 of the Constitution, contains no reference to any right, privilege, or immunity secured to citizens or persons. Instead, the Commerce Clause appears as one of a series of provisions granting specified *powers* to Congress. It states with simple directness that "The Congress shall have Power . . . To regulate Commerce . . . among the several states . . . ." Continental has not argued, and the Court of Appeals did not find, that Congress has exercised this power so as to preempt the challenged Florida legislation. Rather, the decisions below found this legislation unconstitutional under the "dormant" Commerce Clause, a doctrine fashioned by this court to prevent the states from discriminating against interstate commerce even when Congress has not exercised its regulatory power. *See generally H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). This recognizes that although states may regulate commerce, they may not do so when regulation, if any, must come from Congress. The dormant Commerce Clause doctrine, therefore, is actually an application of the Supremacy Clause at Article 6, cl. 2 of the Constitution. It is the Supremacy Clause that is being enforced when private litigants are permitted, in the face of congressional silence, to challenge state regulation that impedes or discriminates against interstate commerce.[98]

In *Hood*, this Court identified the purpose of the Commerce Clause to have been the prevention of "commercial

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[98] *See* L. Tribe, *American Constitutional Law*, 403-04 (2d ed. 1988).

warfare" between the states that had come " 'to threaten at once the peace and safety of the Union.' " [99] Its purpose was to provide the central government with the power to control interstate commerce and to prevent the individual states from engaging in destructive trade and tariff practices which had threatened to destroy commercial harmony and the national union under the Articles of Confederation.[100]

The Framers of the Constitution plainly viewed the power to regulate commerce as an allocation of authority between the state and federal governments, *not* as a grant of rights to citizens.[101] In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945), this Court explicitly recognized that the Commerce Clause was intended to effect a "distribution of power between national and state governments." Thus, as the Eighth Circuit correctly held

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[99] *Hood*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, §§ 259-60).

[100] *See, e.g., The Federalist, No. 22,* (A. Hamilton) and *The Federalist No. 42* (J. Madison) for statements of the Founders' serious concern about the threats to both interstate commerce and political union that had been caused by discriminatory state trade practices during the Confederation period. *See also* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979), ("[A] central concern of the Framers . . . [was that] the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations . . . among the States under the Articles of Confederation.").

[101] Madison confirms that the Commerce Clause is designed to serve national rather than individual ends and was intended to allocate power between the federal and state governments: "The Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which it vests in the [federal] government, including restraints imposed on States. The SECOND to the particular structure of the government and the distribution of the power among its several branches." Madison assigned the Commerce Clause to the first category and further stated that the Clause's object was the "maintenance of harmony and proper intercourse among the States." *The Federalist, No. 41* at 255-56 (J. Madison) (C. Rossiter ed. 1961).

in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), "the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." [102] By proposing the Commerce Clause the Framers sought to ensure that "our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy." [103] While producers and consumers of goods and services are generic and incidental beneficiaries of this "federal free trade unit," [104] the Clause does not grant to them definable individual *rights*.

In accordance with the Founds' understanding, this Court's decisions have confirmed that, while the Commerce Clause protects the operation of interstate markets, it does *not* guarantee the rights of individual participants in those markets. For example, as discussed above, this Court recognized in *Exxon* that, even though the burden of the challenged Maryland law fell exclu-

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[102] *Kassel*, 730 F.2d at 1145. *Accord*, J. & J. Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985). Commentators have similarly interpreted the Commerce Clause as a provision allocating power between the federal and state governments and *not* as a provision granting rights to individuals. "[W]hen it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution . . . [W]hen a person alleges that one of the federalism provisions of the Constitution has been violated he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one." J. Choper, *Judicial Review And The National Political Process*, 174-75 (1980). "It is true that the litigation [in cases under the Commerce Clause] is between private parties, but the issues touch the relative jurisdiction of nation and state." Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 22-23 (1940).

[103] *Hood*, 336 U.S. at 537.

[104] *Id.* at 538-39.

sively on out-of-state companies, the statute was nevertheless constitutional because the statute was not discriminatory. In dismissing the claims of the excluded out-of-state companies, the Court affirmed that "the Clause protects the interstate market, *not particular interstate firms*, from prohibitive or burdensome regulations." [105] Similarly, in *CTS Corp.*, the validity of an Indiana statute regulating corporate takeovers was upheld even though the statute's impact was claimed to fall primarily on out-of-state bidders. This Court rejected that claim because "[t]he fact that the burden falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." [106]

Thus, in evaluating claims under the Commerce Clause, this Court has focused on the burden on the market—on commerce—*not* the effect on individual participants in that market. *Exxon* and *CTS Corp.* make clear that *lawful* state regulation of commerce can have serious negative impact on interstate market participants, but that correct Commerce Clause analysis does not focus on that impact alone. This is because a *national* interest is vindicated when a discriminatory barrier to interstate commerce is removed and the need for such vindication is not established by disruption of an *individual* interest.[107]

Continental's lack of an individual, constitutionally secured right under the Commerce Clause is confirmed by the fact that Congress may, under its power to regulate

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[105] *Exxon*, 437 U.S. at 127-28 (emphasis added); *see* Argument, Part II(B)(1), *supra*.

[106] *CTS Corp.*, 481 U.S. at 88.

[107] *See* Argument, Part III(A)(2), *infra* for discussion of Bowman v. Chicago & N. W. Ry., 115 U.S. 611 (1885) (Plaintiffs' "alleged right" infringed by state statute challenged under Commerce Clause "secured to them, if secured at all, not by the Constitution, but by . . . general law") and Carter v. Greenhow, 114 U.S. 317 (1885) (only "individual right" that is "secure[d]" by the Contracts Clause is the right to a "judicial determination" on constitutionality of challenged state action).

interstate commerce, prohibit Continental from owning an ISB in Florida. Indeed, as already shown, Congress *has* barred Continental from establishing an FDIC-insured ISB or any other banking institution in Florida. Continental, therefore, has no "right" secured by the Constitution to own or operate an ISB in Florida. The issue in Continental's suit is whether Florida's challenged legislation infringes on the authority of the federal government to regulate interstate commerce, not whether Continental's "rights" should be vindicated, for it has no such rights under the Constitution.

2. *Congress Did Not Intend Section 1983 to Create a Remedy for States' Violation of the Dormant Commerce Clause.*

It is beyond question that when Congress enacted Section 1983 in Section 1 of the Act of April 20, 1871, entitled "An Act to enforce the Provisions of the Fourteenth Amendment . . .," it did so to protect rights secured by the Civil War amendments to the Constitution.[108] The legislative history of the statute contains no indication that a violation of the Commerce Clause was intended to be actionable under Section 1983.[109] The absence of any

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[108] Chapman v. Houston Welfare Rights Or., 441 U.S. 600 at 611 (1979); *see generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952), and *Development in the Law: —Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-56 (1977).

[109] In fact, indication that the Act of April 20, 1871 was specifically *not* concerned with "provisions of the Constitution [like the dormant Commerce Clause] which restrain and directly relate to the States" is provided by remarks to that effect by Rep. Shellabarger at Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871).

For discussion whether Congress has the *power* to enact remedial legislation to enforce every constitutional limit on the states *see* Collins, "Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983, 77 Georgetown L.J. 301 (1989) at 351-56; Amar, *A Neo-Federalist View of Article III: Separting the Two Tiers of Federal Jurisdiction*, 65 B.U.L. Rev. 205, 223 n.28 (1985); and Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines, Congressional Imposition of Suit Upon the States*, 126

stated intent to enforce the Commerce Clause in the deliberations of Congress on Section 1983 is explained by the plain meaning of the statutory language. Because the Commerce Clause cannot be understood to grant individual constitutional rights, a state's violation of the dormant Commerce Clause is not a "deprivation of any rights, privileges, or immunities secured by the Constitution . . ." for which a cause of action is available under Section 1983. Congress could have chosen broader language had it wished to authorize Section 1983 actions for "any claim or entitlement" under the Constitution. Instead, Congress chose language self-evidently not the broadest available, demonstrating an intention to restrict the scope of Section 1983.[110]

The limited scope of § 1983 is further demonstrated by passage of the Act of March 3, 1875, 18 Stat. 470, Section 1 of which created the federal question jurisdiction now at 28 U.S.C. § 1331. If all claims under the Constitution were *already* cognizable under the 1871 enactment of Section 1983, then passage of the 1875 statute meant either that Congress intended the jurisdic-

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U.Pa.L.Rev. 1203, 1265-68 (1978). *Cf.* Employees v. Missouri Dept. of Public Welfare, 411 U.S. 279, 320 n.7 (1973) (Brennan, J., dissenting) ("The Contract Clause . . . is not an enumerated power . . . It is simply a prohibition self-imposed by the States upon themselves and it granted Congress no powers of enforcement"), and The Civil Rights Cases, 109 U.S. 3, 12 (1883) (Contracts Clause gives Congress no legislative enforcement power).

[110] Particularly important for the analysis required by this case is the absence of "powers secured by the Constitution" from the description of legal entitlements guaranteed by Section 1983. Since the Comerce Clause indeed creates "powers," inclusion of such language would have indicated that interference with those powers was intended to be actionable under Section 1983. The absence of such language suggests the opposite conclusion. In this regard it is significant that a leading commentator has posited only four possible kinds of legal entitlements: "rights," "privileges," "immunities," and "*powers*." Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 Yale L.J. 16 (1913). Only the first three of these are entitled to be protected by Section 1983.

tional amount requirement of Section 1331 to apply to all Section 1983 actions or that Congress intended the federal question statute to have no role in enforcing constitutional limits on state action. It is certain that neither of these could have been the intent of Congress. Therefore, whatever the actual scope of Section 1983 intended by Congress, it cannot have been understood to embrace *all* violations of any constitutional provisions.[111]

In accordance with its plain meaning, Section 1983 has been applied in the decisions of this Court to provide a remedy only where a claimant can show deprivation of "federal constitutional [or] statutory *rights*."[112] Thus in *Carter v. Greenhow*, 114 U.S. 317 (1885), violation of a state's obligation under the Contracts Clause[113] not to impair contracts was held not actionable under Section 1983 because that constitutional provision, like the Commerce Clause, does not create individual rights secured by the Constitution.[114]

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[111] Collins, *supra*, note 109 at 362-63. While Lynch v. Household Finance Corp., 405 U.S. 538, 546-47 (1972) indicates that the "color of . . . state law" requirement in 28 U.S.C. § 1343(3) prevents an all-inclusive reading of that statute (and, by implication, of Section 1983) from making Section 1331 wholly superfluous, the federal question statute would be rendered superfluous for challenging the constitutionality of any state action. *Id.*

[112] *Thiboutot*, 448 U.S. at 5 (quoting Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966)) (emphasis added).

[113] U.S. Const. Art. I, § 10, cl. 1.

[114] The Court said of the Contracts Clause:

> That constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution.

This Court's construction of the jurisdictional counterparts of Section 1983 in *Chapman*, *supra* and in *Bowman v. Chicago & Northwestern Railway Co.*, 115 U.S. 611 (1885),[115] further establish consistent judicial approach that precludes a cause of action under Section 1983 to redress violation of the dormant Commerce Clause. In *Bowman* this Court dismissed an appeal raising a challenge to a state statute that allegedly interferred with interstate commerce because the plaintiff failed to meet the jurisdictional amount required for federal question jurisdiction. To avoid this, Plaintiffs had argued jurisdiction under Rev. Stat. § 699(4), a jurisdictional counterpart of Section 1983,[116] which placed jurisdiction in this Court "without regard to the sum or value in dispute [for appellate review] in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution . . . ." [117] In a holding similar to *Carter*, this Court found that the plaintiffs had not been deprived of a right "secured by the Constitution" by the state regulation alleged to violate the dormant Commerce Clause.[118]

Chapman involved construction of 28 U.S.C. § 1343(3) and concluded that "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution'. . . ." [119] Because dormant Commerce Clause claims

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[115] See note 107 *supra*.

[116] *See Thiboutot*, 448 U.S. at 15, 16 n.2 (Powell J., dissenting) for discussion of the jurisdictional portions of Section 1 of the Act of April 20, 1871.

[117] *Bowman*, 115 U.S. at 614-15.

[118] *See also* Connor v. Rivera, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 579 (1939) (predecessor of 28 U.S.C. § 1343(3) not available to provide jurisdiction for dormant Commerce Clause case).

[119] *Chapman*, 441 U.S. at 615.

have been regarded as "constitutionally based supremacy clause claims," [120] *Chapman* strongly suggests that such claims do not involve rights secured by the Constitution.

Continental has argued below for extension of the holding in *Maine v. Thiboutot*, 448 U.S. 1 (1980), i.e., that Section 1983 provides a remedy for deprivations under color of state law of any federal *statutory* right, to similarly apply Section 1983 to redress *all* constitutional violations. This case does not provide the Court means to so expand *Thiboutot* because, as just shown, Continental has not been deprived of "any rights, privileges, or immunities secured by the Constitution . . . ." [121] Such a ruling would, moreover, require repudiation of a century of federal jurisprudence and expansion of the scope of Section 1983 vastly beyond that intended by Congress.[122]

3. *Applying Section 1983 to Dormant Commerce Clause Actions Would Promote Damage and Attorneys' Fees Claims by Business Interests, not Vindicate Individual Civil Rights as § 1983 Intended.*

Dormant Commerce Clause claims, unlike individual rights claims, are generally economic in nature and typically involve disputes between businesses and governmental bodies over regulation. The claims have traditionally been brought as federal questions pursuant to 28 U.S.C. § 1331. The principal reason to bring such a claim under the civil rights legislation is to enhance damage awards and secure attorneys' fees under § 1988.

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[120] Collins, *supra*, note 109 at 359.

[121] *See* Argument, Part III(A)(1), *supra*.

[122] *See* Collins, *supra*, which identifies three "considerations" militating against Section 1983's applicability to all unconstitutional state action: "(1) congressional power and legislative intent surrounding § 1983; (2) long judicial practice and legislative intent surrounding the federal question statute as a mechanism to combat unconstitutional state action; and (3) diminished need on the part of many litigants who claim injury from economic and regulatory legislation for the incentives provided by § 1983's remedial scheme." *Id.*

With respect to damages, one recent commentator has noted: "[A]pplication of § 1983's rule of automatic damages for proven economic injury in regulatory challenges would enormously heighten federalism tensions. *The sheer scale of interim damages to regulated business arising from legislation would dwarf individual § 1983 damage awards.*" [123]

As for attorneys' fees, if § 1983 were held to create a cause of action for claims under the dormant Commerce Clause, then any person conceivably affected by a state economic regulation would be encouraged to bring a claim under the Commerce Clause in order to secure attorneys' fees under § 1988. Such a result would undercut this Court's recognition of the "American Rule" governing attorneys' fees in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975). *See Thiboutot*, 448 U.S. at 1, 24-25 (Powell, J., dissenting). Attorneys' fees awards are not needed nor are they desirable in dormant Commerce Clause litigation. Businesses that are adversely affected by discriminatory state regulation (in contrast to individuals whose personal rights are violated) do not need the economic incentive of attorneys' fees to prosecute legitimate claims under the Commerce Clause. Moreover, the imposition of attorneys' fees in such cases would place an added burden on state and local governments "as a consequence of [their] good faith efforts at economic regulation." [124]

Thus, the threat of huge claims and attorneys' fees for lost economic opportunity and damages by business would undoubtedly have a chilling effect on legitimate regulatory effort.[125] If § 1983 is extended to claims under the Commerce Clause, it can safely be predicted that such

[123] Collins, *supra*, at 369 (emphasis added).

[124] Collins, *supra*, at 370.

[125] While states may be protected from retroactive damages awards, the Eleventh Amendment, local governments and individual officials would be liable, in some cases even when acting in good faith. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

claims, with their promise of generous damage and fee awards, will "quickly become tomorrow's cottage industry for a new class of constitutional litigants." [126] The principal effect of applying § 1983 to Commerce Clause claims will be to promote economic claims by business interests, a result wholly inconsistent with the § 1983's original purpose of protecting the civil rights of individual citizens.

B. Continental Is Not a Prevailing Party Under 42 U.S.C. § 1988 Because It Has Obtained no Relief.

This Court has recently and carefully examined the meaning of "prevailing party" under § 1983 in *Hewitt v. Helms*, 482 U.S. 755 (1987). The Court made it clear that the proper test is whether the defendant alters his conduct toward the plaintiff as a result of the suit. Since Continental has obtained no actual relief, it is not a prevailing party whether or not its action is cognizable under § 1983. As this Court said in *Helms*:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment but some action . . . by the defendant that the judgment produces . . . some specific performance . . . . The real value of the judicial pronouncement . . . is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*. 482 U.S. at 761 (emphasis in original).

The fact that a judgment was rendered and later mooted does not meet the *Helms* test. "[A] judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* an equivalent." *Id.* at 761 (emphasis in original). This was affirmed in *Rhodes v. Stewart*, 109 S. Ct. 202 (1988) in which the Court held that plaintiffs were not prevailing parties under § 1988 even though a judgment had been entered in their favor where the controversy had become moot before the judgment was issued.

[126] Collins, *supra*, note 109 at 374.

In this case at the time the Court of Appeals rendered its original decision on September 22, 1987, the case had become moot by virtue of Florida's cessation of chartering ISBs on August 30, 1984 and by the passage of CEBA on August 10, 1987. Continental was then precluded by state and federal law from obtaining the charter for which it had applied. There was, therefore, no justiciable controversy before the Court of Appeals and the opinion that it rendered was advisory in nature because the Court was unable to grant the relief that Continental had sought.[127]

This case squarely falls within the holding of *Rhodes* that "In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorneys' fees." *Rhodes*, 109 S.Ct. at 204.

CONCLUSION

For the reasons stated above, the decision below should be reversed on the merits or, in the alternative, vacated and remanded on the ground of mootness.

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[127] As explained in Argument, Part I (A), *supra*, Continental applied for a charter to establish an FDIC-insured ISB. By virtue of CEBA, that application is now barred by the Douglas Amendment. Because Continental has failed to demonstrate any firm intent to apply for an *uninsured* ISB, the speculative possibility that it *might* attempt to pursue such an application cannot be said to amount to effective "relief." *See* Argument, Part I(B), *supra*.

Respectfully submitted,

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August, 1989

APPENDIX

APPENDIX

APPLICATION

To the Comptroller of the State of Florida

FOR AUTHORITY TO ORGANIZE AN INDUSTRIAL SAVINGS BANK PURSUANT TO CHAPTER 664, FLORIDA STATUTES

CONTINENTAL ILLINOIS SAVINGS BANK OF DADE COUNTY

(Name of Proposed Industrial Savings Bank)

888 Brickell Avenue
Miami, Florida 33131

(Address of Proposed Industrial Savings Bank)

Form DBF-C-31

The applicants listed below hereby apply to the Department of Banking and Finance (hereinafter referred to as Department), pursuant to Chapter 664, Florida Statutes, for authority to organize and operate

CONTINENTAL ILLINOIS SAVINGS BANK OF DADE COUNTY

(Name of Proposed Industrial Savings Bank)

The following Exhibits prepared in accordance with the Department's General Information and Instructions designed to meet statutory requirements are submitted as part of this Application.

EXHIBIT A—Public Convenience and Advantage

EXHIBIT B—Reasonable Promise of Successful Operation

EXHIBIT C—Capital Structure

EXHIBIT D—Directors and Officers

EXHIBIT E—Name

EHXIBIT F—Industrial Savings Bank Quarters

CERTIFICATE

The Applicants hereby certify that the information contained in this Application is true and complete to the best of their knowledge and belief; further, the Applicants accept the responsibility of informing the Department promptly of any changes in the information presented herein.

Executed this 23rd day of June, 1981.

(Name)	(Signature)
WILLIAM D. PLECHATY	/s/ William D. Plechaty
RICHARD H. HANNEMANN	/s/ Richard H. Hannemann
JAMES P. JOHNSON	/s/ James P. Johnson
GAIL M. MELICK	/s/ Gail M. Melick
ROBERT J. FIDDES	/s/ Robert J. Fiddes

If the INDUSTRIAL SAVINGS BANK is to be controlled by a registered bank holding company, submit the

signature and title of the holding company representative.

/s/ Donald C. Miller DONALD C. MILLER (Signature)	Vice-Chairman (Title)

CONTINENTAL ILLINOIS CORPORATION
(Holding Company)

SUMMARY FACT SHEET

1. Proposed name of the INDUSTRIAL SAVINGS BANK:

   The proposed name of the industrial savings bank (the "INDUSTRIAL SAVINGS BANK") is "CONTINENTAL ILLINOIS SAVINGS BANK OF DADE COUNTY".

2. Proposed location of INDUSTRIAL SAVINGS BANK:

   The INDUSTRIAL SAVINGS BANK will be located at 888 Brickell Avenue, Miami, Dade County, Florida 33131.

3. Proposed capitalization of INDUSTRIAL SAVINGS BANK:

   The proposed capitalization of the INDUSTRIAL SAVINGS BANK is as follows:

Capital	$1,000,000
Surplus	1,000,000
Undivided Profits	225,000
TOTAL	$2,225,000

   The INDUSTRIAL SAVINGS BANK intends to issue 100,000 shares of stock with a par value of $10.00 per share and a selling price of $22.25 per share. The INDUSTRIAL SAVINGS BANK will be a wholly owned subsidiary of Continental Illinois Corporation, Chicago, Illinois.

4. Proposed directors and officers of INDUSTRIAL SAVINGS BANK:

Board of Directors	*Officers*
William D. Plechaty, Chairman	Richard H. Hannemann, President
Richard H. Hannemann	Norman A. Dabagia, Cashier
James P. Johnson	
Gail M. Melick	
Robert J. Fiddes	

5. Name, address and telephone number of person authorized by Applicants to receive correspondence for them:

   The authorized corresponding agent for the INDUSTRIAL SAVINGS BANK is Bowman Brown, Esq. Mr. Brown's mailing address and telephone number are as follows:

   Bowman Brown, Esquire
   Shutts & Bowen
   Southeast First National Bank Building
   100 South Biscayne Boulevard
   Ninth Floor
   Miami, Florida 33131
   Telephone: (305) 358-6300

EXCERPTS FROM EXHIBIT A TO APPLICATION

* * * *

4(b). Describe in detail to the fullest extent available from public information the following: (1) The breadth of services offered by the above institutions; (2) The interest rates charged by them on various types of loans; (3) The service charges assessed by them on demand deposit accounts, if offered; (4) Their charges for other services, such as safe deposit boxes; (5) Their hours of business, including drive-in and walk-up facilities.

Commercial banks and savings and loan associations operating in and near the PSA [primary service area] can generally be described as "full-service" in nature; however, certain financial institutions do not offer services provided by other institutions and disparities exist with respect to the pricing of certain services.

Surveys were conducted by the firm of M. J. Badalich & Associates, Inc., with respect to the extent and pricing of financial services available in the PSA. The results of those surveys are contained in Exhibits IIIa through IIIh. Additional information with respect to services is provided in the following paragraphs.

DEPOSITORY PRODUCTS

- *Regular (Passbook) Savings*—All commercial banks operating in the PSA return 5¼ percent per annum on regular savings deposits and all savings and loan associations operating therein return 5½ percent per annum on such deposits. The foregoing rates are the maximum permissible under existing law.

- *T-Bill Certificates*—All commercial banks and savings and loan associations operating in the PSA offer 6-month and 2½ year T-Bill certificates. Rates paid, which vary on a weekly basis, are the maximum rates permissible under existing law.
- *NOW Accounts*—Exhibit IIIa indicates that all commercial banks and savings and loan associations operating in the PSA offer NOW Accounts and that those accounts return 5¼ percent per annum. Exhibit IIIa also indicates that the pricing of NOW Accounts varies from institution to institution. For example, the Southeast First National Bank reportedly has no minimum requirement with respect to opening a NOW Account while the Barnett Bank of Miami, N.A., reportedly requires a minimum opening balance of $2,000. The minimum/average monthly balance required to avoid services charges ranges from a low of $500 at Brickell Savings to a high of $2,000/$2,500 at the Barnett Bank of Miami. As depicted in Exhibit IIIa, service charge policies vary from institution to institution.
- *Time Deposit Accounts*—Exhibit IIIb provides specific information relative to time deposit accounts of $100,000 or less offered by commercial banks and savings and loan associations operating in the PSA. Exhibit IIIb indicates that certain institutions offer a wide range of time deposit accounts while other institutions offer a much narrower range. Minimum amounts to establish time deposit accounts ranged from a low of $100 to a high of $5,000.

LOAN PRODUCTS

- *Long-Term Residential First Mortgage Loans*—Exhibit IIIc provides specific information relative to long-term residential first mortgage loans offered by the commercial banks and savings and loan associations operating in the PSA. The Exhibit reveals that most commercial banks are not currently involved in long-term residential mortgage lending.
- *Home Improvement Loans*—Exhibit IIId provides specific information relative to terms and rates of home improvement loans offered by PSA commercial banks and savings and loan associations. The Exhibit indicates that all PSA institutions offer home improvement loans; that terms range from 5 years to 12 years and that interest rates range from 15½ percent to 18 percent per annum. Home improvement loans take the form of second mortgages.
- *Installment Loans*—Exhibit IIIe provides specific information relative to terms and rates charged for new and late model used automobile loans provided by commercial banks and savings and loan associations operating in the PSA. The Exhibit indicates that commercial banks will make new auto loans for a maximum period of 48 months and that interest rates charged for such loans range from 15.21 percent to 17.75 percent per annum. The Exhibit also indicates that commercial banks generally make late model used auto loans for maximum terms of 36 to 42 months and that rates charged for such loans range from 17.29 percent to 18.00 percent per annum. Sun Bank of Miami would not quote

terms and rates over the phone and neither of the savings and loan associations offer auto loans.

- *Other Loan Products*—Inquiries as to terms and rates of secured and unsecured commercial loans resulted in statements that terms and rates are highly volatile in today's market and that among other factors, are dependent upon the bank/customer relationship.

HOURS OF BUSINESS

- *Lobby Hours*—Exhibit IIIf provides lobby hours of all commercial bank and savings and loan offices operating in the PSA. The Exhibit indicates that lobby hours begin at 9:00 am or 9:30 am and that closing hours vary widely. Only one commercial banking office (S.W. 8 street office of the Bank of Miami) maintains Saturday hours. That office's lobby is open from 9:00 am to noon on Saturday.
- *Drive-in Hours*—Drive-in hours of financial institutions that offer drive-in facilities vary widely; and but one banking office (S.W. 8 Street office of Bank of Miami) maintains Saturday hours.

  Two of the existing eight PSA commercial banking offices (Brickell Office of Bank of Miami and Brickell Office of Southeast First National) do not offer drive-in facilities. Additionally, drive-in facilities are not available at either of the savings and loan offices.
- *Walk-up Hours*—Only three of the PSA's existing eight commercial banking offices and only one of the pertinent savings and loan offices offer walk-up teller service. Walk-up hours at these three banking offices and one savings and loan office vary widely.

OTHER SERVICES

* *Safekeeping Facilities*—Exhibit IIIg provides information relative to the availability and cost of safe deposit boxes at PSA commercial bank and savings and loan offices. The Exhibit indicates that safe deposit boxes are not available at the South Miami Avenue office of the Florida National Bank of Miami nor at Brickell Savings and Loan, which is currently housed in temporary quarters. The Exhibit also indicates that significant differences exist with respect to the annual cost of safe deposit boxes and that the key deposit varies widely.

* *Other Services*—Exhibit IIIh provides an indication as to the availability of other services at PSA commercial bank and savings and loan offices. Services listed include the issuance or service of major credit cards, the availability of travelers checks, whether the offices accept utility payments, the availability of direct deposit of social security checks and whether on-site Automatic Teller Machines are provided.

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6. Relating to Item 4(b) above, describe how the INDUSTRIAL SAVINGS BANK will compare to existing financial institutions insofar as breadth of services, prices, interest rates, and hours are concerned

The breadth of services, prices, interest rates and hours of business of the INDUSTRIAL SAVINGS BANK will compare favorably with those offered by existing financial institutions in the area. A detailed explanation of the types of services to be offered, the prices to be

charged for these services, the interest rates to be paid for deposits and the proposed hours of business of the INDUSTRIAL SAVINGS BANK follow:

DEPOSITORY PRODUCTS

A broad range of deposit relationships will be offered by the INDUSTRIAL SAVINGS BANK. These will include:

* *Transaction Accounts*—Transaction accounts will be made available to individuals and all others eligible under law. The transaction accounts will be competitively priced based upon minimum balances and/or service charges. The transaction accounts to be offered will provide customers with negotiable order of withdrawal access to their accounts and will permit customers to earn interest on balances.

* *Savings Accounts*—Traditional savings accounts will be offered by the INDUSTRIAL SAVINGS BANK. These accounts will provide customers with the maximum in liquidity while enabling them to earn interest at the same time. Savings accounts should appeal to special segments of the public who are saving for special purposes and do not desire the ability to issue checks or negotiable orders of withdrawal against the account.

* *Time Deposit Accounts*—A variety of time deposit accounts will be offered to meet the diverse savings and investment goals of potential customers.

(1) *T-Bill Certificates*—182-day and 2½ year certificates issued in denominations of $10,000 or more which will pay interest based on Treasury Bill rates estab-

lished at weekly auctions conducted in New York will be available.

(2) *Certificates of Deposit*—Negotiable and nonnegotiable certificates of deposit will also be available in all denominations. The interest rates paid will be the highest allowed by law where legal limitations apply. For certificates in excess of $100,000, competitive money market rates prevailing in New York or Chicago will be paid.

The deposit relationships which will be offered by the INDUSTRIAL SAVINGS BANK will be the most extensive allowable under law and will fully service the depository needs of the community. All deposit relationships will be insured to the maximum extent allowed by the Federal Deposit Insurance Corporation.

LOAN PRODUCTS

The INDUSTRIAL SAVINGS BANK will extend credit to individuals in the area in a variety of ways designed to provide the maximum service possible consistent with the sound operation of the INDUSTRIAL SAVINGS BANK. The following credit relationships will be offered:

* *Home Mortgage Loans*—Home mortgage loans, competitive in form and price with those offered in the market, will be made available.

* *Home Equity Loans*—Home equity loans in the form of second mortgages will be available upon terms which are competitive with those available in the marketplace. It is expected that home equity loans will be particularly attractive in the Dade County market

where property values have increased substantially over recent years.

* *Secured Installment Credit*—Various secured installment credit relationships will be offered to customers to finance such purchases as automobiles and other consumer items and to finance home improvements. Secured installment credit will be offered on a basis which is competitive with that available in the marketplace.

* *Credit Cards*—Access to major credit cards and associated products will be provided. Credit cards offered will include both Master Card and Visa.

* *Other Credit Accounts*—Various types of specialized secured and unsecured credit relationships will be made available. These credit relationships will be tailored to the needs of various market segments and special situations. They may include executive credit lines, bridge loans, education loans and other specialized types of credit.

OTHER SERVICES

Other banking services to be offered include the following:

* *Standard Financial Institution Services*—Cashiers checks; money orders; travelers checks; direct deposit of payroll, pension and social security checks; wire transfers; bank-by-mail services and credit life, accident and health insurance will be made available through the INDUSTRIAL SAVINGS BANK.

* *Financial Engineering*—The INDUSTRIAL SAVINGS BANK will provide advice and counsel to business and professional organiza-

tions on their short, medium and long term financial needs and structure.

- *Financial Counseling*—Professionally trained and experienced staff will provide individual financial counseling on such matters as retirement planning, budgeting, major expense financing and investments. Personal management of financial affairs will be stressed in printed materials and through financial models and discussion.

- *Consumer Education*—Various techniques will be used to educate customers and the general public about personal financial affairs. Topics will include management of the household budget, interest rate impact, inflation, the overall state of the economy and its impact on the individual, retirement planning, financing a child's education, definition of various financial terminology in layman's terms and a number of other topics of interest to the general public. Sample copies of the types of materials which will be utilized are displayed behind the tab entitled "Educational Materials."

  The INDUSTRIAL SAVINGS BANK will acquire and utilize various consumer finance oriented educational demonstrations and displays. A consumer education library will also be located in the INDUSTRIAL SAVINGS BANK for use during business hours.

- *Electronic Technology*—Electronic delivery systems will be introduced as the INDUSTRIAL SAVINGS BANK'S customer base and costs make their introduction economically feasible.

- *Drive-in Facilities*—The INDUSTRIAL SAVINGS BANK will offer drive-in facilities. The location of the INDUSTRIAL SAVINGS BANK on Brickell Avenue, a major thoroughfare to and from the downtown Miami area, should make this service of substantial convenience to customers.

- *Walk-up Facilities*—The INDUSTRIAL SAVINGS BANK will also offer walk-up facilities.

- *Safe Deposit Boxes*—It is expected that the INDUSTRIAL SAVINGS BANK will initially provide approximately 500 safe deposit boxes. Charges will depend upon the size of the box offered. It is anticipated that there will be a $5.00 key deposit.

HOURS OF BUSINESS

The lobby, drive-in and walk-up hours of the INDUSTRIAL SAVINGS BANK will be determined at such time as the INDUSTRIAL SAVINGS BANK is established. Based on existing competitive conditions, it is expected that the INDUSTRIAL SAVINGS BANK will maintain lobby hours from 9:00 am to 4:00 pm Monday through Friday; drive-in hours from 9:30 am to 6:00 pm Monday through Friday; walk-up window hours from 8:00 am to 9:30 am and from 4:00 pm to 6:00 pm Monday through Friday. If it is determined that Saturday lobby and/or drive-in hours will be beneficial to the area's public, Saturday service will be instituted.

SUMMARY

In summary, the Continental Illinois Savings Bank of Dade County will provide a full array of financial products and services at fair and competitive prices, stressing a high level of service to the customer and the community.

• • • •

APPELLEE'S

BRIEF

NO. 87-1988 (10)

OCT 3 1988

JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE APPELLEES CONTINENTAL BANK CORPORATION, ET AL.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' determination that this case is not moot should be affirmed despite amendment to the federal Bank Holding Company Act, which effectively precludes Appellees' proposed Florida industrial savings bank ("ISB") from obtaining Federal Deposit Insurance Corporation ("FDIC") insurance, because (a) Florida law does not require ISBs to obtain FDIC insurance; (b) the subject application may be amended as a matter of right to delete the intention to apply for FDIC insurance; and (c) regardless of the contents of the original application, the Court of Appeals' decision will permit Appellees to file new applications for ISBs without FDIC insurance.

2. Whether the Court of Appeals' determination that the amendment to Fla. Stat. § 664.02 to abolish Florida ISBs is unconstitutional under the Commerce Clause should be affirmed because the amendment was enacted for the avowed purpose and effect of continuing unconstitutional conduct in defiance of this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), and the decisions of the district court below.

3. Whether the Court of Appeals abused its discretion in granting Appellees' motion for their reasonable attorneys' fees when Appellant failed to file any response to the motion.

4. Whether the award of reasonable attorneys' fees should be affirmed because, in the alternative,

   (a) There is sufficient record evidence to support the award of such fees as sanctions in the exercise of discretion by the appellate court;

(b) Appellees prevailed on claims which are reasonably related to the Equal Protection and Due Process claims for which fees may be awarded under 42 U.S.C. § 1988; or

(c) Appellees prevailed on their Commerce Clause claims and thus demonstrated the deprivation of a "right, privilege or immunity under the Constitution" within the scope of 42 U.S.C. § 1983.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Eleventh Circuit:

(1) Gerald A. Lewis, as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida, appellant herein; and

(2) Continental Illinois Corporation n/k/a Continental Bank Corporation, William D. Plechaty, Richard H. Hanneman, James P. Johnson, Gail M. Melick and Robert J. Fiddes, appellees herein.

Pursuant to Rule 28.1, Continental Bank Corporation submits the following list of its parents, subsidiaries and affiliates as of September 25, 1989.

Barval, Inc.
Braciff B.V., Cayman Islands
CIC Trading, S.A., Argentina
CI Funding Corporation
C.I.N.B. Nominees (London) Limited
Colonial Maritime Inc.
Conill Corporation
Continental Bank Foundation
Continental Bank International
Continental Bank, National Association
Continental Brokerage Services, Inc.

Continental Capital Management Corporation
Continental Capital Markets Limited
Continental Consulting Company, Ltd., London
Continental Euroasia Finance Limited, Hong Kong
Continental Finance, S.A., France
Continental First Options, Inc.
Continental Futures and Options Corporation
Continental Gestion S.A., France
Continental Global Financial Corporation
Continental Illinois Acquisition Corporation
Continental Illinois (Asia) Limited, Hong Kong
Continental Illinois Bancorp, Inc.
Continental Illinois Commercial Corporation
Continental Illinois Corporation
Continental Illinois de Mexico, S.A. de C.V., Mexico
Continental Illinois Energy Development Corporation
Continental Illinois Equity Corporation
Continental Illinois Finanziaria S.P.A., Italy
Continental Illinois Holding Corporation
Continental Illinois (Nominee) Limited, Hong Kong
Continental Illinois Overseas Finance Corporation, N.V.
Continental Illinois Property Corporation No. 1
Continental Illinois Property Corporation No. 2
Continental Illinois Property Corporation No. 3
Continental Illinois Service Corporation
Continental Illinois Servicos Ltda., Brazil
Continental Illinois Trust Company of Florida, National Association
Continental Illinois Venture Corporation
Continental International Finance Corporation
Continental International Finance Corporation, Ltda., Chile
Continental International Finance Corporation, Ltda., No. 2, Chile

Continental International Finance Corporation IV, Ltda., Chile
Continental International Finance S.A., Luxembourg
Continental International Securities Limited, Cayman Islands
* Continental Sellas Banco de Investimento S.A. Brazil
Continental Sellas Distribuidora de Titulos e Valores Mobiliarios S.A., Brazil
Cumbria Shipping Company Limited
First Options of Chicago, Inc.
First Options of Chicago Ltd., London
Geone Corporation
Great Lakes Life Insurance Company
Henderson Market Center, Inc.
Ismael I, Inc., Cayman Islands
Ismael II, Inc., Cayman Islands
Juliana, Inc., Cayman Islands
Justin, Inc., Cayman Islands
* Lease Continental GMBH, Germany
* Lease Continental Limited, London
Lease Continental PLC, London
Mellutus B.V., Netherlands
P & S Limited Partnership
Societe Anonyme Financiere D'Administration et de Gestion, Belgium
* Tanner & Continental Illinois S.A. Administradora de Fondos Mutudos, Chile
* Tanner & Continental Illinois S.A. Corredores de Bolsa, Chile
Valores Mercantiles Bancoti, C.A. Venezuela
Venco, B.V., Cayman Islands
Vin, S.A., Chile

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* Not a wholly-owned subsidiary of Continental Bank Corporation.

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

The State of Florida initiated a discriminatory campaign against out-of-state bank holding companies ("BHCs") seventeen years ago by enacting Fla. Stat. § 659.141(1)(1972). In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court sought to end this conduct by declaring portions of Fla. Stat. § 659.141(1) unconstitutional under the Commerce Clause. The Florida Legislature promptly thwarted that effort, however, by reenacting the statute almost verbatim as Fla. Stat. § 658.29(1)(1980) and by extending its scope to prohibit out-of-state BHCs from owning Florida industrial savings banks ("ISBs"). Fla. Stat. § 664.03(3).[1] As shown by this appeal, appellant Gerald Lewis, as Comptroller of the State of Florida and Head of the Department of Banking and Finance (the "Department"), also persisted in his attempts to enforce the unconstitutional prohibitions.

The instant action arose when the Department refused to accept an application by the appellees (collectively referred to as "Continental") to establish a Florida ISB as a wholly-owned subsidiary of appellee Continental Bank Corporation f/k/a Continental Illinois Corporation ("CBCorp") (J.A.17).[2] The Department's refusal to accept Continental's

[1] Originally codified as Fla. Stat. § 664.03(14)(1980), recodified as Fla. Stat. § 664.03(13)(1982), now codified as Fla. Stat. § 664.03(3) (1987). The present statutory number is used herein.

[2] The Joint Appendix will be cited as "J.A.," the Department's Jurisdictional Statement as "J.S.," the Appendix to the Department's Jurisdictional Statement as "J.S.App.," the record as "R.," the Department's Brief as "Department Br.," the Solicitor General's Brief as "U.S.Br.," the *amici* Nat'l Conf. of State Leg's Brief as "NCSL Br.," Continental's Appellate Answer Brief in Case No. 85-3165 as "Cont.Ans.Br." and the Department's Appellate Answer Brief in Case No. 85-3949 as "Department's Ans.Br.".

application was solely predicated on CBCorp's status as an out-of-state BHC. After the district court entered a preliminary injunction against enforcement of the challenged statutes (R.19), the Florida Legislature responded by amending Fla. Stat. § 664.02 (1982) to impose a moratorium on the further issuance of ISB charters. After the moratorium expired, the district court entered final summary judgment for Continental, finding Fla. Stat. § 664.03(3) unconstitutional (J.S.App.37a). The Florida Legislature responded by amending Fla. Stat. § 664.02 to permanently prohibit the further issuance of ISB charters. 1984 Fla. Laws Ch. 84-216, § 34. The district court refused to dismiss the case as moot, invoking the "capable of repetition, yet evading review" doctrine in apparent recognition of Florida's ability to enact unconstitutional legislation more quickly than it could be voided by the courts.

The district court's judgment, with modifications, was affirmed by the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals" or "court below") (J.S.App.37a,1a). The Court of Appeals further found that the amendment to Fla. Stat. § 664.02 had been enacted for the purpose of perpetuating unconstitutional discrimination and was therefore unconstitutional under the Commerce Clause. Continental then moved the Court of Appeals for the award of its appellate attorneys' fees. The Department did not respond to this motion and it was granted (J.S.App. 36a). This appeal followed.

A. STATUTORY BACKGROUND

The statutory background to this appeal begins with the enactment of the 1970 amendments to § 4(c)(8) of the Bank Holding Company Act of 1956 (the "BHC Act"). 12 U.S.C. § 1843(c)(8) (Supp. V 1987). In pertinent part, the 1970 amendments authorized BHCs to engage in such nonbanking activities as were determined by order or regulation of the Board of Governors of the Federal Reserve System (the "Board") to be "so closely related to banking . . . as to be a proper incident thereto." The Board exercised this authority and by regulation provided that BHCs could acquire or control certain types of nonbanking subsidiaries (referred to herein as "§ 4(c)(8) subsidiaries") including, *inter alia*, trust companies, companies providing investment advisory services and ISBs. 12 C.F.R. § 225.25(b)(2)-(4) (1988).[3]

Under the Douglas Amendment to the BHC Act, a BHC may acquire a "bank" subsidiary only in the state of the BHC's principal banking operations unless specifically authorized by the laws of the state in which the to-be-acquired "bank" is located. 12 U.S.C. § 1842(d). The Douglas Amendment thus prevents a BHC from owning a "bank" in more than one state unless permitted by state law. The BHC Act does not contain any geographical restriction on BHC ownership of § 4(c)(8) subsidiaries. The litigation below thus primarily focused on the Department's contention that a Florida ISB subsidiary of a BHC is a "bank" subject to the Douglas Amendment, rather than a § 4(c)(8) subsidiary.

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[3] This statutory background is summarized in *BT Investment Managers, Inc. v. Lewis*, 461 F. Supp. 1187, 1191-92 (N.D. Fla. 1978) (3 judge court), *aff'd in relevant part*, 447 U.S. 27 (1980).

Until the August 10, 1987 effective date of the Competitive Equality Banking Act of 1987 ("CEBA"), § 2(c) of the BHC Act defined a "bank" as an entity which both accepted demand deposits and engaged in the business of commercial lending. 12 U.S.C. § 1841(c) (1982). CEBA, in pertinent part and subject to certain exceptions, amended § 2(c) to provide that any entity which accepts deposits insured by the Federal Deposit Insurance Corporation ("FDIC") also is a "bank" under the BHC Act. 12 U.S.C. § 1841(c)(1) (as amended by Pub. L. No. 100-86, § 101(a), 101 Stat. 554 (1987)).

The Board's regulation of BHC ownership of ISBs as a permissible § 4(c)(8) subsidiary reflects this statutory scheme by providing that a BHC can own an ISB under this statutory provision only if the ISB is not a "bank." 12 C.F.R. § 225.25(b)(2) (1988). Under the federal regulatory scheme, it is thus impossible for a BHC to own an ISB as a § 4(c)(8) subsidiary in violation of the Douglas Amendment.

Under Florida law, an ISB is prohibited from accepting demand deposits but is permitted to accept negotiable order of withdrawal ("NOW") account deposits.[4] Fla. Stat. § 664.08(1). Florida ISBs are permitted but not required to make commercial loans, Fla. Stat. §§ 664.07 and 664.08, and are permitted but not required to obtain FDIC insurance, Fla. Stat. § 664.03(10). Prior to the effective date of CEBA, a Florida ISB was incapable of being deemed a "bank" under the BHC Act because it could not accept demand deposits. After the effective date of CEBA, a Florida ISB could obtain FDIC insurance and be deemed a

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[4] NOW account deposits are not demand deposits. *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

"bank" but in such circumstances could not be acquired by a BHC as a § 4(c)(8) subsidiary.

B. HISTORICAL BACKGROUND

In 1972, Bankers Trust New York Corporation ("Bankers Trust"), a New York BHC, announced its intention to establish a Florida chartered entity which would provide investment advisory services to banks. The Florida Legislature responded by prohibiting any out-of-state BHC from owning or controlling a Florida subsidiary which provided investment advisory services to banks. 1972 Fla. Laws, ch. 72-96, § 1; Fla. Stat. § 659.141(1)(1972). Bankers Trust then filed an application with the Board to establish and operate a Florida chartered investment advisory subsidiary which would provide services to entities other than banks. In response, the Florida Legislature in a 1972 special session amended Fla. Stat. § 659.141(1) to flatly prohibit out-of-state BHCs from owning or controlling any Florida investment advisor or trust company. 1972 Fla. Laws, ch. 72-726, §§ 1-7. Bankers Trust then filed suit seeking, *inter alia*, to declare Fla. Stat. § 659.141(1) to be unconstitutional under the Commerce Clause. Lengthy litigation followed. *BT Investment Managers, Inc. v. Dickinson*, 379 F. Supp. 792 (N.D. Fla. 1974), *reversed and remanded sub. nom. BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950 (5th Cir. 1977), *on remand*, 461 F. Supp. 1187 (N.D. Fla. 1978) (3 judge court), *aff'd in part, vacated and remanded in part*, 447 U.S. 27 (1980), *on remand*, Case No. TCA 73-184 (N.D. Fla. March 11, 1981).

In the subsequent litigation, District Judge Stafford, for a unanimous three-judge court, in pertinent part declared Fla. Stat. § 659.141(1) to be facially unconstitutional under the Commerce Clause. *BT Investment Managers, Inc.*, 461 F. Supp. 1187. The three-judge court subsequently denied the

Department's motion to stay its ruling.[5] Based on the pendency of the appeal to this Court in *BT Investment Managers, Inc.*, however, the Department continued to refuse to process applications by other out-of-state BHCs. The refusal to process applications was based on the perceived "effect on the public's confidence in the stability of their financial institutions" if the applicant was later required to close its office as a result of a successful appeal by the Department in *BT Investment Managers, Inc.* (R.23 at Ex.D). The Department's position both violated the ruling on the stay and was contrary to its own policies which permitted a financial institution to open an office despite the existence of a pending appeal. *See First National Bank of Miramar v. Lewis*, 355 So. 2d 869 (Fla. 1st DCA 1978). Manufacturers Hanover Corporation, an out-of-state BHC, accordingly filed suit. In the decision in that litigation, Judge Stafford again held Fla. Stat. § 659.141(1) to be unconstitutional.[6]

This Court affirmed the finding that Florida's prohibitions against out-of-state BHC ownership of § 4(c)(8) subsidiaries were unconstitutional under the Commerce Clause. 447 U.S. 27. Initially, this Court rejected any defense of the statute on the basis that the banking industry was not part of interstate commerce. 447 U.S. at 38-39. Noting evidence of protectionist intent, the Court further rejected various justifications for the discrimination against out-of-state BHCs and determined that, absent congressional authorization, Florida's protectionist practices violated the Commerce Clause. This Court then rejected the claim that the BHC

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[5] Order dated June 19, 1979. This unreported Order and the other unreported Orders discussed herein appear in the record below as exhibits to Continental's Memorandum of Law in Support of its Motion for Summary Judgment (R.23).

[6] *McElroy v. Lewis*, Case No. 80-76 (N.D. Fla. Dec. 11, 1980).

Act authorized any geographical restrictions on § 4(c)(8) subsidiaries or that its savings clause authorized any conduct otherwise violative of the Commerce Clause. 447 U.S. at 47 n.13, 49.

During the pendency of the appeal to this Court, the Department apparently advised th Florida intended to reenact Fla. Stat. § 659.141(1) in order to avoid mooting the appeal. 447 U.S. at 53 n.15. This Court rendered its decision in *BT Investment Managers, Inc.* on June 9, 1980. Immediately thereafter, a July 1980 special session of the Florida Legislature reenacted Fla. Stat. § 659.141(1) virtually verbatim as Fla. Stat. § 658.29(1). In conjunction with the passage of Fla. Stat. § 658.29(1), the Florida Legislature also extended its unconstitutional prohibitions to the ownership of Florida ISBs by out-of-state BHCs. Fla. Stat. § 664.03(3). After remand from this Court, Judge Stafford for the three-judge court again held Florida's prohibitions against ownership of § 4(c)(8) subsidiaries by out-of-state BHCs to be unconstitutional under the Commerce Clause.[7]

The Department's current explanation for the reenactment of Fla. Stat. § 659.141(1) is that it "prevented the remanded proceedings from being moot" (Department's Response to Motion to Dismiss or Affirm at 2 n.2).

C. THE LITIGATION BELOW

In June 1981, CBCorp, a Delaware corporation with its principal place of business in Illinois, applied to the Department for a charter to establish a Florida ISB as a wholly-owned subsidiary of CBCorp (J.A.21-22). The Department did not read the application or otherwise review its contents except to the extent required to determine that the application was made by an out-of-state BHC (R.18 at 42-43). The Department then expressly refused to give any consideration to its merits and denied the application as legally precluded pursuant to Fla. Stat. § 658.29(1), as made applicable to ISBs by Fla. Stat. § 664.03(3).

[7] Case No. TCA 73-184 (N.D. Fla. March 11, 1981).

Continental filed the instant action in August 1981 seeking to declare Fla. Stat. §§ 658.29(1) and 664.03(3) to be unconstitutional, to enjoin further enforcement of the challenged statutes and to require the Department to process the subject application (J.A.4). Continental's complaint asserted claims under the Commerce, Due Process, Equal Protection and Supremacy Clauses of the Constitution pursuant to 42 U.S.C. § 1983. Jurisdiction was premised on 28 U.S.C. §§ 1331 and 1343(3) (J.A.4).

Continental then moved for a preliminary injunction and, pursuant to Fed. R. Civ. P. 65(a), for the consolidation of the preliminary injunction hearing with the final hearing on the merits (R.3,4,11). The motion for a preliminary injunction to require the immediate processing of the application was granted (R.19). The Rule 65(a) motion was denied based on the Department's belief that additional factual development was required and its claim that there existed a "new body of law" which indicated that ISBs were "banks" under the BHC Act (R.18 at 4,6,38). Despite this professed need, the Department never undertook any discovery other than questions directed to the contents of Continental's application which was already in the Department's possession. As was later found by the district court, there also was no authority then existing which supported the Department's legal position (R.42).

The Florida Legislature then amended Fla. Stat. § 664.02 to impose a moratorium on the further issuance of ISB charters by the Department. *See* 1982 Fla. Laws ch. 82-214, § 27, Fla. Stat. § 664.02(2) (1982 Supp.). The district court

found the moratorium to have been imposed "[i]n response" to the entry of the preliminary injunction (J.S.App.39a). After expiration of the moratorium, Continental moved for summary judgment (R.22,23). The district court requested further briefing of certain issues including the question of whether there were any other statutory barriers to the processing of the application (R.37). After the Department responded without citation of any other direct statutory prohibitions (R.38), the district court entered summary judgment finding Fla. Stat. § 664.03(3) to be facially constitutional but unconstitutional as applied under the Commerce Clause (J.S.App.37a).[8]

The entry of summary judgment triggered responses by both the Department and the Florida Legislature. The Department responded with a Fed. R. Civ. P. 59 motion to alter or amend judgment claiming that a certain previously undisclosed incipient agency policy independently required the rejection of the subject application (R.43). The undisclosed agency policy was a requirement under Fla. Stat. § 658.21 that Florida IBSs both make commercial loans and accept NOW account deposits and thus become subject to the BHC Act prohibition against ownership by out-of-state BHCs. The Department claimed that engaging in both of these activities was indispensable to prove a "reasonable promise of successful operation" pursuant to Fla. Stat.

[8] The finding of facial constitutionality was predicated on a then extant Board ruling finding NOW account deposits to be a form of demand deposits, a ruling which led the district court to find that a Florida ISB could be a "bank" under the BHC Act. *See First Bancorporation v. Board of Governors of Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984), *rev'g.* 68 Fed. Res. Bull. 253 (1982). The subsequent reversal of *First Bancorporation* by the Tenth Circuit was one ground for Continental's cross-appeal below.

§ 658.21(2). The Department accordingly urged that the summary judgment was "premature" pending the development of an administrative record.

There is substantial record evidence which indicates that the Department manufactured this purported policy in order to perpetuate its unconstitutional discrimination. The Department's assertion that there was an independent statutory basis to reject the subject application other than the challenged statutes was contrary to its admissions in its answer to the complaint and in the parties' stipulations (J.A. 21,25). The Department further had failed to reveal this purported agency policy despite specific request from the district court for briefing of this issue (R.37,38). Finally, deposition testimony in a related proceeding indicates that the then Director of the Department's Division of Banking had no independent knowledge regarding the formation, existence or scope of the alleged agency policy (R.58 at 15-16 & Ex.C). It also appears that the Department's attempt to require an ISB to engage in activity discretionary by statute (such as commercial lending) was illegal under Florida's interpretation of the doctrine of non-delegation of legislative power (R.47 at 10).

During the pendency of the motion to alter or amend judgment, the Florida Legislature responded to the entry of summary judgment by again amending Fla. Stat. § 664.02 to flatly prohibit the further issuance of ISB charters. 1984 Fla. Laws, ch. 84-216, § 34. The legislative history to this amendment to Fla. Stat. § 664.02 in pertinent part provides:

> Sections 34 and 35 of the bill were included in the bill because of growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking. Two years ago, the legislature imposed a one-year moratorium on the issuance of new ISB charters pending the outcome of

litigation over the application of Continental Illinois Corporation to establish ISBs in Florida. A federal court in Florida has now ruled in favor of Continental Illinois, and in the wake of that decision both Citicorp and BankAmerica Corporation have applied for ISB charters. Since Florida industrial savings banks are authorized to engage in virtually all banking activities with the exception of commercial and demand accounts, an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits.

Accordingly, . . . section 34 of the bill prohibits the issuance of any new industrial savings bank charters . . . (J.A:31).

After the enactment of Fla. Stat. § 664.02, as amended, the Department moved for dismissal on the ground of mootness (R.54,55). Continental responded by challenging the validity of Fla. Stat. § 664.02 on constitutional and state law grounds and contending that an invalid statute could not form the basis for dismissal (R.58). Continental asserted that the statute was invalid under the Commerce and Due Process Clauses and, in the circumstances of this case, should not be retroactively applied to the pending application under the Due Process Clause and state law (R.58). After the Tenth Circuit reversed the Board's decision in *First Bancorporation, see* footnote 8 *supra*, Continental also filed a supplemental brief with the district court suggesting reconsideration of the portion of the summary judgment which relied on the Board's decision (R.50).

The district court disposed of the pending motions in a Final Judgment *Nunc Pro Tunc* dated February 22, 1985 (J.S. App.51a). The district court denied the Department's Fed. R. Civ. P. 59 motion because the Department had failed to assert the existence of its claimed incipient agency

policy despite specific inquiry from the court and because the purported policy required ISBs to engage in activities which were discretionary under Florida law. The district court also denied the motion to dismiss for mootness under the "capable of repetition, yet evading review" doctrine. Finally, the district court refused to reconsider its ruling as to the status of NOW account deposits and suggested that Continental raise this issue in the administrative process or by cross-appeal.

Continental then moved for the award of its reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 or as sanctions pursuant to F.R.C.P. 11, 28 U.S.C. § 1927 or inherent court power (R.78). The district court denied this motion without explanation (R.88).

The Department appealed and Continental cross-appealed the district court's judgment (R.69,71). The Department appealed both the finding that Fla. Stat. § 664.03(3) was unconstitutional as applied to out-of-state BHCs and the refusal to dismiss the case as moot. Continental cross-appealed the finding that Fla. Stat. §§ 658.29(1) and 664.03(3) in conjunction were facially constitutional and additionally sought to have Fla. Stat. § 664.02 determined to be unconstitutional under the Commerce or Due Process Clause or to be inapplicable to the pending application under state law. Continental additionally appealed from the denial of its attorneys' fees (R.89).

The parties then filed with the Court of Appeals a Joint Motion to Stay Further Proceedings based upon then pending consideration by this Court of *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) and *U.S. Trust Corp. v. Board of Governors of Federal Reserve System*, 474 U.S. 1098 (1986), *on remand*, 800 F.2d 1534 (11th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). The Joint Motion specifically stated that

"[A]ll parties agree that effective and economical presentation of this appeal and cross appeal can best occur after the United States Supreme Court's review of the aforesaid decision or decisions, in that voluntary dismissal of this appeal or cross appeal or both may result from expression of the Supreme Court's views on these issues." The Joint Motion was granted and the appeal was stayed. Despite the decisions in *Dimension Financial* and *U.S. Trust*, the Department maintained its position and proceeded to brief and argue the merits before the Court of Appeals.

In September 1987, the Court of Appeals issued its decision holding Fla. Stat. §§ 658.29(1) and 664.03(03) to be unconstitutional under the Commerce Clause (J.S.App.1a). The Department does not challenge this finding in the appeal herein and accordingly does not dispute that the processing of the subject application has been unconstitutionally delayed since July 1981 (J.S.7).

The Court of Appeals additionally found Fla. Stat. § 664.02 to be unconstitutional based both on its avowed purpose as expressed by the legislative history and on its discriminatory effects. Relying on *BT Investment Managers, Inc.*, the Court of Appeals rejected the contention that congressional authorization for state discrimination against ownership of "banks" by out-of-state BHCs permitted such discrimination against § 4(c)(8) subsidiaries. Finally, the Court of Appeals remanded to the district court for an explanation of the basis for its denial of attorneys' fees.

The Department then moved for rehearing. The Department asserted that the CEBA amendments expanding the BHC Act definition of "bank" to include entities with deposits insured by the FDIC mooted the appeal because the subject application indicated an intention to apply for

FDIC insurance.[9] The Court of Appeals denied the motion for rehearing in a decision dated February 26, 1988 (J.S.App.31a). In the same opinion, the Court of Appeals granted Continental's motion for the award of its appellate attorneys' fees.

SUMMARY OF ARGUMENT

The amendment to the BHC Act to define "banks" to include entities with FDIC insurance does not moot this case. Although a Florida ISB with FDIC insurance is subject to the Douglas Amendment and thus cannot be established by an out-of-state BHC under federal law, Florida law does not require ISBs to obtain FDIC insurance. Continental thus can still pursue its pending application and can file new applications for ISBs without FDIC insurance.

The Department's attempt to obtain dismissal based on its perception of Continental's intentions should be rejected. Continental has not abandoned its application. The enactment of CEBA has had no meaningful effect on Continental's intentions. It intends to propose the establishment of one or more non-FDIC insured ISB subsidiaries upon the successful conclusion of this litigation provided conditions at that time warrant such proposals. This case therefore is not moot.

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[9] CBCorp's ISB application proceeding before the Florida Division of Administrative Hearings, Case No. 82-416, has been abated since 1982. The initial abatement was on motion by the Department pending entry of a final order by the district court. The terms of the stay were expanded by order dated October 18, 1985, "pending resolution of the pending federal litigation."

The Court of Appeals' decision striking the amendment to Fla. Stat. § 664.02 as violative of the Commerce Clause should be summarily affirmed. State regulation with the purpose or effect of discriminating against out-of-state entities violates the Commerce Clause. The historical background and legislative history demonstrate Florida's blatant intent to discriminate against CBCorp and other out-of-state BHCs by depriving them of an effective means to gain access to Florida deposits. Indeed, the Department essentially admits such intent in this appeal. The discriminatory effect also is apparent. The pending ISB applications by CBCorp and other out-of-state BHCs were terminated while the existing ISBs were preserved. The Court of Appeals therefore correctly determined that Fla. Stat. § 664.02 was void.

The Court of Appeals did not abuse its discretion or commit plain error in granting Continental's unopposed motion for attorneys' fees. The award of such fees is justified on three independent grounds. The Department's frivolous defense of Fla. Stat. § 664.03(3) warrants the award of fees as sanctions. Alternatively, the reasonable relationship between Continental's Commerce Clause claims on which Continental prevailed and the equal protection challenge to Fla. Stat. § 664.03(3) and the due process challenge to the retroactive application of Fla. Stat. § 664.02 which were not addressed by the Court of Appeals also support the award of fees pursuant to 42 U.S.C. § 1988. Finally, since the Commerce Clause secures "rights, privileges or immunities under the Constitution," attorneys' fees are directly compensable under § 1988. This conclusion is compelled by the plain language of 42 U.S.C. § 1983. Legislative history is insufficient to restrict the breadth of the statutory language. Reliance on legislative history further is questionable because the most persuasive conclusion that can be drawn

from the Congressional debates is that § 1983 was intended to provide a remedy for the deprivation of "rights, privileges and immunities" as defined by natural rights jurisprudence, a legal doctrine which was long ago discarded by this Court. If the scope of § 1983 is to be determined by analysis of original intent, however, historical evidence and decisions interpreting the Article IV Privileges and Immunities Clause demonstrate a Congressional intent to provide a remedy for dormant Commerce Clause claims. There thus is no principled basis to interpret § 1983 other than in accordance with its plain meaning.

ARGUMENT

I. THE AMENDMENT OF THE BHC ACT DEFINITION OF "BANK" TO INCLUDE FDIC INSURED ENTITIES DOES NOT MOOT THIS APPEAL BECAUSE ISBs ARE NOT REQUIRED TO OBTAIN FDIC INSURANCE UNDER FLORIDA LAW.

The Department's primary argument in this appeal focuses on the claim that this case is moot as a result of CEBA's amendment to the BHC Act definition of "bank" to include entities with FDIC insurance. Under CEBA, a Florida ISB with FDIC insurance is subject to the Douglas Amendment and thus cannot be established by an out-of-state BHC under federal law. Since CBCorp is an out-of-state BHC, the Department urges that dismissal for mootness is required.

The most noteworthy defect in this contention is that CEBA does not bar the creation of a Florida ISB without FDIC insurance. As the Department acknowledged when it requested the Court of Appeals to dismiss this case for mootness, "Florida law does not and has never required ISBs to maintain FDIC insurance as a condition for accepting deposits."[10] Unlike every mootness case cited to this Court, the event which purportedly moots this controversy does not prevent Continental from obtaining the relief requested—the right to have an ISB application accepted for processing on the merits.

This analysis is not altered by the statement in the subject June 1981 application that deposits will be insured to the "maximum extent allowed" by the FDIC (J.S.1-2), be-

[10] Suggestion of Gerald A. Lewis For Rehearing *En Banc* dated October 12, 1987 at 8.

cause there is no reason to believe that the FDIC would provide insurance to an entity which would thereby become illegal. Moreover, an applicant for an ISB charter may amend its application "as a matter of course" at any time within thirty days after the application is received for filing and thereafter with the permission of the Department. Fla. Admin. Code § 3C-9.002(6) (1983). The Department apparently acknowledges or at least does not dispute this plain language interpretation of its own regulation (Department Br. 14-15). Continental may thus delete any reference to FDIC insurance as a matter of right when the Department finally accepts the subject application for filing.

This case would not be moot even if the subject application had indicated an irrevocable intention to apply for FDIC insurance for the proposed ISB. Continental has requested declaratory relief finding the challenged statutes to be unconstitutional, injunctive relief restraining their continued enforcement and injunctive relief requiring the Department to process the subject application. The CEBA amendments would only moot the portion of the Court of Appeals decision which requires the processing of the original application. The declaratory relief finding the challenged statutes unconstitutional and restraining their enforcement continues to present a live controversy because such relief is a necessary predicate to the filing of new ISB applications by CBCorp. *See BT Investment Managers, Inc.*, 447 U.S. at 35 n.5.

In order to avoid these conclusions, the Department and *amici* have adopted the novel tactic of seeking dismissal based on an unsubstantiated allegation that Continental intends to abandon its application. As Continental has previously advised this Court, CBCorp intends to propose the creation of one or more non-FDIC insured Florida ISB subsidiaries upon the successful conclusion of this litigation.

provided conditions at that time warrant such proposals. Continental further represents that the absence of FDIC insurance has had no meaningful effect on its intentions. Despite the Department's skepticism, it is unreasonable to require updated applications to be filed until this litigation is concluded. The substantial allocation of resources required for an application means that prompt processing is an economic necessity so that the applicant can be operated in accordance with the business plan developed for that purpose. In addition to the costs of preparing the application, there is the need to designate officers, pay salaries, rent office space, develop plans and procedures for office routines and otherwise comply with regulatory requirements (R.18 at 25-29). *See also* Fla. Admin. Code § 3C-10.0051.[11]

CBCorp currently engages in substantial activities in Florida through its subsidiaries (Department Br. 34), and intends to expand its Florida presence by pursuing any "economically viable and valuable" Florida business opportunity. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987). A Florida ISB operated in conjunction with CBCorp's present Florida trust facilities, for example, would increase the financial services available to its trust company customers. This litigation seeks to preserve that business opportunity.

In response, the Department and *amici* in substance claim that an ISB without FDIC insurance would not be profitable because depositors insist on this protection. There is, however, no cited evidence that existing ISBs without FDIC insurance are unprofitable,[12] nor is there any other

[11] Review of the subject application illustrates the regulatory requirements (R.4 at Ex.G).

[12] *Amici's* citation of the lack of other out-of-state BHC applications for Florida ISB subsidiaries is the result of Florida's discriminatory conduct rather than economic considerations (NCSL Br. 9). As shown by the legislative history of Fla. Stat. § 664.02, numerous ISB applications were filed after Continental prevailed in its challenge to Fla. Stat. § 664.03(3).

evidence in support of this claim. Since the deregulation of interest rates, there has been enormous growth in uninsured deposits. There currently is approximately $350 billion in such accounts, excluding the portion of deposits in FDIC-insured entities which exceed the $100,000 limitation.[13] CBCorp also could obtain private insurance, post a letter of credit or enter into a variety of other arrangements for the protection of ISB depositors.

The existence of a case or controversy requires only a reasonable likelihood that Continental will seek the processing of an ISB application upon the voiding of Fla. Stat. § 664.03(3). Numerous cases recognize that this threshold test is satisfied by "expectations that, while reasonable, were hardly demonstrably probable." *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 601 n.6 (1988). The only concern in those cases was whether the "controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more likely than not." *Id.* (Court's emphasis).

[13] For a description of the regulatory and market forces which created uninsured money market deposits, see R. LITAN, WHAT SHOULD BANKS DO? 25-59 (1987). As of September 20, 1989, the Investment Company Institute reports deposits of $348.98 billion in 466 money-market mutual funds. Wall Street Journal, Sept. 22, 1989, at § C-23, col.1. These uninsured deposits also are recorded in the Board's 1.60 series under the mutual fund shares line item. *See* 75 Fed. Res. Bull. A45 (Aug. 1989).

The Department's apparent belief that its perception of the subjective intent of an opposing party is sufficient to warrant dismissal is unsupported by any authority and, on the facts of this case, is sheer presumption. Continental has endured almost nine years of litigation due to the Department's refusal to even accept the subject ISB application for processing. The Department's conduct makes it impossible for Continental to ever submit an application which will not be so stale as to require the preparation of a new application by the time litigation is concluded. In these circumstances, Continental is entitled to first establish its right to have an ISB application processed through a determination of the validity of Fla. Stat. § 664.02 without the necessity for symbolic updates to its application.

This Court, for example, has recognized a party's right to challenge allegedly burdensome union election procedures without first invoking such procedures or expressing "any intention of doing so in the future." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 299 (1979). While first requiring invocation of the procedures would have removed any doubt about the existence of concrete injury, the necessity for subsequent time-consuming litigation would have meant that "little could be done to remedy the injury in the particular election." *Id.* at 300 n.12. Continental similarly will have no adequate remedy if it is required to file a new or amended application which then will become stale over the years of subsequent litigation. Since this action is limited to whether the Department is empowered to issue ISB charters, there further will be no factual development, clarification of the issues or other benefit in imposing such a requirement.

Continental represents that it has not abandoned its application or its interest in filing new ISB applications in

other Florida localities. The Department's blanket refusal to process ISB applications similarly

> is not contingent, has not evaporated or disappeared and, by its continuing and brooding presence casts what may well be a substantial adverse effect on the interests of the petitioning parties.

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974). This case therefore is not moot.

This case was filed because the Department unconstitutionally refused to process an application by an out-of-state BHC. At that time, the Department was indifferent to the contents of the application or the creation of an administrative record (R.18 at 41). After almost nine years of litigation, the Department now does not dispute that its original refusal to process the subject application violated the United States Constitution. If the Department desires to moot this litigation, it can do so by confessing judgment.

II. THE COURT OF APPEALS' DECISION THAT FLA. STAT. § 664.02 IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE SHOULD BE SUMMARILY AFFIRMED.

The Court of Appeals' decision that Fla. Stat. § 664.02 is unconstitutional is squarely predicated on prior decisions of this Court. The decision relies on historical background, the existence of discriminatory effects and an avowed discriminatory purpose—criteria which have been regularly employed by this Court in a century of Commerce Clause jurisprudence. The decision further is based on an uncontradicted record demonstrating intentional unconstitutional misconduct with such clarity as to warrant sanctions for the Department's continued defense of its conduct.

The standards applied for determining the validity of state regulation against Commerce Clause challenge are well

settled. In summary, discriminatory protectionist legislation is condemned under a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). Alternatively, narrowly drawn state legislation which serves a legitimate local purpose and is neutral in its effects upon local and interstate commerce is permissible if it survives scrutiny under the balancing test set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

These standards apply to both facially discriminatory and facially neutral state regulation. "The Commerce Clause forbids discrimination, whether forthright or ingenious . . . ." *Best & Co. v. Maxwell,* 311 U.S. 454, 455-56 (1940); *see also American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 281 (1987) (facially nondiscriminatory state tax invalid); *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 352-54 (1977). The finding that the challenged state regulation constitutes economic protectionism further may be made on the basis of either discriminatory purpose or discriminatory effects. *Bacchus Imports, Ltd v. Dias,* 468 U.S. 263, 270-71 (1984); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471 n.15 (1981). *See generally* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 Mich. L. Rev. 1092 (1986).

An uncontradicted record demonstrates that Fla. Stat. § 664.02 has a discriminatory purpose. Discriminatory purpose may be established by historical background, the "specific sequence of events leading to passage of the statute" and, most fundamentally, admission by the legislature. *Edwards v. Aguillard,* 482 U.S. 578, 594-95 (1987); *Bacchus Imports, Ltd.,* 468 U.S. at 271 ("need not guess at the legislature's motivation" when protectionist intent admitted in legislative history). *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative*

Motive, 1971 S. Ct. Rev. 95. The events preceeding the enactment of Fla. Stat. § 664.02 provide evidence of protectionist intent clearly sufficient under this Court's decisions. *Compare Maine v. Taylor,* 477 U.S. 131, 148-153 (1986), *with Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. at 352. Additional evidence is provided by the conduct of this litigation.

The enactment of Fla. Stat § 664.02 was a direct response to the district court decision "in favor of Continental" invalidating Florida's prohibitions against ownership of Florida ISBs by out-of-state BHCs. The legislative history expressly states that the statute was enacted "because of growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking." It was intended to preclude "an effective way for out-of-state bank holding companies to gain access to Florida deposits" (J.S.App.16a-17a). The Court of Appeals therefore was plainly correct in its finding that the "avowed purpose" of § 664.02 was to "protect Florida's banks from [out-of-state] competition . . ." (Id. 17a).

The discriminatory effects of Fla. Stat. § 664.02 also are apparent. The pending ISB applications by out-of-state BHCs were all terminated while the existing ISBs, apparently owned by in-state entities (NCSL Br. 18 n.12), were protected by a grandfather clause. Adopting the reasonable assumption that statutes will have the effects intended by the legislature, an effective means of obtaining access to Florida deposits has been abolished. The Department's attempt to contend that this discrimination is substantially minimized by other means of entry to Florida markets is simply irrelevant. "[W]here discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach,* 486

U.S. 269, 108 S. Ct. 1803, 1809 (1988). Indeed, given the absolute nature of Florida's prohibition, the Department can hardly complain that the effects are not quantified with more precision.

In these circumstances, the Department's attempts to defend this statute by reference to Fla. Stat. § 658.296, Florida's regional banking statute are, like its earlier efforts, "frankly speaking, incredible." *BT Investment Managers, Inc.*, 559 F.2d at 954. The Department effectively concedes that Florida's purpose was to protect in-state business from out-of-state competitors.[14] The lesson which it still has not learned is that discrimination against entities other than "banks" violates the Constitution. Further, other than the accident of timing, there is not a shred of record evidence that consideration of the regional banking statute, as opposed to animus against out-of-state BHCs, had any role in the amendment of Fla. Stat. § 664.02. The Department's initial claim that Fla. Stat. § 664.02 has "at most, an incidental, *de minimis* impact on interstate commerce" also contradict its assertion that the Florida legislature had a factual basis to justify the abolition of ISB charters based on regional banking concerns (J.S.40-44).[15]

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[14] The claim that the discriminatory effects result from federal and not state law is frivolous. Federal law permits out-of-state BHCs to own Florida ISBs. Federal law does not permit discrimination against entities other than "banks" as to the market for Florida deposits. The contention that the Court of Appeals erred in focusing on a broader market than the ISB industry is contradicted by this Court's decisions which subject facially neutral statutes to strict scrutiny. This contention, if accepted, further would permit piecemeal discrimination.

[15] Ironically, the Board reached similar factual conclusions regarding the unconstitutional effects of Fla. Stat. § 658.296. *Chemical New York Corporation*, 73 Fed. Res. Bull. 609 (May 29, 1987), *appeal pending, Lewis v. Federal Reserve Board*, Case No. 87-3455 (11th Cir.).

The Department's citation of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), is similarly insufficient. The statute challenged in *Exxon* did not have a protectionist purpose or a discriminatory effect. *BT Investment Managers, Inc.*, 447 U.S. at 41-42. The Department's reliance on *CTS Corp.* for its focus on state power over the corporate chartering process also fails to acknowledge this critical distinction. Nothing in *CTS Corp.* authorizes a state to act unconstitutionally merely because it was clever enough to do so through its corporate business code. A federal court faced with unconstitutional conduct plainly is not required to defer to state sovereignty claims. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Puerto Rico v. Branstad*, 483 U.S. 219, 228-29 (1987). Because the amendment to Fla. Stat. § 664.02 is intended to perpetuate unconstitutional discrimination, it is void. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 229-31 (1964).

The Department's final objection, that the Court of Appeals has required Florida to indefinitely continue to process ISB applications, is inaccurate. The decision below found the amendment to Fla. Stat. § 664.02 to be void. No injunctive relief was entered with respect to Fla. Stat. § 664.02. The Florida Legislature may enact any appropriate regulatory provisions which are not motivated by unconstitutional animus. *Cf., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977); *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 285-287 (1977).

III. THE AWARD OF CONTINENTAL'S REASONABLE ATTORNEYS' FEES SHOULD BE AFFIRMED ON MULTIPLE INDEPENDENT GROUNDS.

Continental moved for the award of its reasonable appellate attorneys' fees as sanctions and pursuant to 42 U.S.C. § 1988. The Department did not respond or otherwise assert any defense to this motion. The Court of Appeals then granted the motion without stating the basis for its ruling and directed the district court to determine the amount of such fees.[16] The Department has never moved for reconsideration of this Order, never requested leave to file opposing papers out-of-time and never provided any explanation for its failure to comply with Fed. R. App. P. 27 in opposing entry of Continental's requested relief. In these circumstances, reversal is warranted only if the Department can demonstrate an abuse of discretion or plain error as to each of the grounds for attorneys' fees asserted by Continental.

Moreover, the Department's inaction renders doubtful its right to appeal from the award of appellate attorneys' fees. Ordinary principles of appellate review generally preclude parties from raising issues which were not addressed below. *E.g., United States v. Donnelly's Estate*, 397 U.S. 286, 295 n. 5 (1970); *see Barrington Press, Inc. v. Morey*, 816 F.2d 341, 343 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 249 (1987). The Department's explanation that opposition was unnecessary because the same issues were briefed as to the district court's denial of fees is inadequate. The Department never responded to the contention that its *appellate* conduct was deserving of sanctions or that Continental was entitled to its *appellate* fees because its success in those proceedings was

[16] The District Court has not yet rendered a decision as to the amount of the fees.

"reasonably related" to compensable claims under *Smith v. Robinson*, 468 U.S. 992 (1984).

A. SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE AWARD OF FEES AS SANCTIONS.

The Department dismisses the possibility that the Court of Appeals awarded attorneys' fees as sanctions because there was "no finding" of improper conduct by the Department (Department Br. 37 n.95). The Department has not provided any authority or other basis for requiring an appellate court to make such a finding, particularly in the context of an unopposed motion. Furthermore, the record provides a more than adequate basis for the imposition of sanctions.

This case concerns the Department's attempt to enforce a statute reenacted immediately after it was unanimously declared unconstitutional by this Court. As the Court of Appeals noted, "[t]he Supreme Court made it abundantly clear in *Lewis* that states are not free to exclude non-banks based on geographic factors." 827 F.2d at 1523. The Department "must have known that it could not justify the exclusion of [out-of-state BHCs] without making a better showing of justification" than it had made in *BT Investment Managers, Inc. See W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 498 (7th Cir. 1984). The statute, however, was reenacted without any new legislative findings. The Department further never attempted to introduce any testimony or other evidence during the proceedings below.

The appellate proceeding was delayed for over one year based on the parties' representation that two cases then pending before this Court might lead to the dismissal of the appeal or cross-appeal. The decision in *Dimension Financial Corp.* did foreclose any claim that NOW account deposits were demand deposits and consequently that Florida ISBs were "banks" under the BHC Act. 474 U.S. 361 (1986).

Binding precedent in the Eleventh Circuit on the nonbank issue was also provided after remand in *U.S. Trust Corp.*, 800 F.2d 1534. The Department plainly could and should have abandoned its defense of Fla. Stat. § 664.03(3) at that time.

The Department instead continued to insist in its appellate briefs that *BT Investment Managers, Inc.*, "has no application to [Continental's] proposed activities in Florida" and characterized Continental's contrary position as a "disregard for truth [which] borders on a willful attempt to mislead the Court" (Department's Ans. Br. at 17). Incredibly, the Department even engaged in lengthy argument in an attempt to deny that Florida had reenacted Fla. Stat. § 658.29(1) after this Court's opinion in *BT Investment Managers, Inc.* (*Id.* at 17-18). There thus is substantial record support for a finding that the Department unreasonably and vexatiously multiplied the appellate proceedings or otherwise engaged in conduct deserving of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. Civ. P. 11 or inherent court power.[17] *See F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974) (award of fees appropriate when opponent acts in bad faith, vexatiously, wantonly, or for oppressive reasons); *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986) (F.R.C.P. 11 standards also appropriate for appellate court). Indeed, the record demonstrates that the award of fees is the only sanction which might serve to enforce the judgment of this Court and the lower courts. *See Hutto v. Finney*, 437 U.S. 678, 689-94 (1978).

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[17] Other examples include the necessity for a court order to compel the Department to file its initial appellate brief.

B. BECAUSE CONTINENTAL'S COMMERCE CLAUSE CLAIMS WERE "REASONABLY RELATED" TO ITS EQUAL PROTECTION AND DUE PROCESS CLAIMS, ATTORNEYS' FEES WERE PROPERLY AWARDED PURSUANT TO 42 U.S.C. § 1988.

Continental further is entitled to its appellate attorneys' fees because its claims under the Equal Protection and Due Process Clauses were "reasonably related to [Continental's] ultimate success." *Smith v. Robinson*, 468 U.S. at 1007 n.10; *Maher v. Gagne*, 448 U.S. 122, 132 & n.15 (1980). The Department's brief does not address this issue other than with a cryptic comment that any due process claim is precluded by the "absence of extra-territorial effect of the challenged Florida legislation" (Department Br. 38 n.96).

The reasonable relationship between the claims under the Equal Protection, Due Process and Commerce Clauses in this case is based on their common focus on demonstration of discriminatory state purpose. This issue was the critical inquiry in the Commerce Clause challenge to Fla. Stat. §§ 664.02 and 664.03(3) and is or would have been indispensable to Continental's equal protection and due process claims. *Compare Bacchus Imports*, 468 U.S. at 270-73, *with Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (discussing relationship between Equal Protection and Commerce Clause analysis of discriminatory state purpose).

There is an "obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.14 (1981). Similarly, the lack of a legitimate state interest is of equal importance to the claims under the Commerce, Due Process and Equal Protection Clauses. Finally, the

absence of congressional authorization is not only central to the claim under the Commerce Clause, but is of significance to the due process and equal protection claims because congressional authorization presumably would have provided the basis for finding a legitimate state interest. In other words, Continental's constitutional claims, in contrast to those at issue in *Smith v. Robinson, supra,* all challenge the same misconduct under analytical tests which require, on these facts, very similar factual and legal predicates.

1. *Equal Protection Clause:* Continental can demonstrate a "substantial" equal protection challenge to Fla. Stat. § 664.03(3). The intent to perpetuate unconstitutional discrimination is not a "legitimate" state purpose which is rationally related to the discriminatory classification under even the most lenient analysis applicable to economic regulation. *E.g., Metropolitan Life Ins. Co., supra.* This issue thus satisfies the *Hagans v. Lavine,* 415 U.S. 528 (1974), "substantiality test" referenced in the legislative history of 42 U.S.C. § 1988. *See Maher v. Gagne,* 448 U.S. at 132 n.15. There is no Supreme Court precedent "specifically dealing" with an equal protection challenge to the subject statute "and settling the matter one way or the other. Nor is it immediately obvious . . . from the face of the complaint [that discrimination against out-of-state bank holding companies] was so patently rational as to require no meaningful consideration." *Hagans,* 415 U.S. at 539-40.

The "substantiality" of Continental's equal protection challenge is further reinforced by consideration of the merits of Continental's claims. For the limited purpose of making a "substantiality" determination for an attorneys' fee request, the record provides an overwhelming basis for finding that the challenged statute was passed for the *sole* purpose of discriminating against out-of-state bank holding companies with the intent of protecting the Florida banking industry.

Because discrimination against out-of-state corporations for the purpose of protecting local industry and the continuation of unconstitutional conduct are both illegitimate purposes under the Equal Protection Clause, it is evident that Continental's equal protection claims are "substantial." *Metropolitan Life Ins. Co., supra; see Griffin v. County School Board of Prince Edward County,* 377 U.S. at 229-31 (1964).[18]

2. *Due Process Clause:* The analysis in the preceding section also demonstrates the "substantiality" of Continental's due process claims. Citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717 (1984), Continental challenged the retroactive application of Fla. Stat. § 664.02 to its pending application (Cont.Ans.Br. at 36). The Due Process Clause in the context of economic regulation requires legislation to be supported by a legitimate legislative purpose furthered by rational means. Retroactive application of a statute further must itself be justified by a rational legislative purpose. *Id.* at 731. Reenacting a statute for the purpose of continuing conduct which was previously held to be unconstitutional cannot be a "legitimate legislative purpose" under even the most lenient interpretation of the Due Process Clause. The subsequent enactment of the ISB ban in order to perpetuate this practice is similarly illegitimate.

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[18] The Department's only response is the citation of *Northeast Bancorp Inc. v. Board of Governors,* 472 U.S. 159, 176-78 (1985). The statute in *Northeast Bancorp,* however, did not favor "local corporations at the expense of out-of-state corporations." *Id.* The decision was based on scrutiny of legislative history which revealed a valid legislative purpose and did not concern an intent to perpetuate unconstitutional misconduct.

Continental accordingly is also entitled to its reasonable attorneys' fees under § 1988 on this ground.[19]

C. THE COMMERCE CLAUSE SECURES "RIGHTS, PRIVILEGES OR IMMUNITIES" WITHIN THE MEANING OF 42 U.S.C. § 1983.

Narrowly stated, the issue on this point is whether the Commerce Clause, in its dormant form, secures "rights, privileges or immunities" within the scope of § 1983.[20] The Department's assertion that it does not is based on the claim that the Commerce Clause is solely an allocational provision governing state and federal relations which creates no individual entitlements of which a person may be deprived and that the scope of § 1983 should be limited to the post-Civil

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[19] The Department, its *amici* and the Solicitor General respond to this contention by asserting without explanation that a due process claim can not be made because the challenged Florida statutes do not have extraterritorial effects. The cases cited in support of this contention, however, do not appear to be relevant to the *Pension Benefit Guaranty Corp.* retroactivity issue.

[20] The lower courts have split on this issue. *Compare Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp v. Smith*, 637 F.2d 181 (3d Cir. 1980); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985); *ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F. Supp. 43 (W.D. Mich. 1984); *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *per curiam aff'd on other grounds*, 425 U.S. 463 (1976), *with Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Private Truck Council, Inc. v. Secretary of State*, 503 A.2d 214, *cert. denied*, 476 U.S. 1129 (1976).

War Amendments. Continental agrees that the issue may be more broadly framed as whether § 1983 is limited to the Thirteenth, Fourteenth and Fifteenth Amendments or whether its scope, subject to certain exceptions, instead extends to all of the Constitution.[21]

1. *Statutory Language:* The starting point for this question of statutory construction is the plain language of § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges and immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

If analysis is restricted to statutory language, there is no basis for exclusion of the Commerce Clause from the "Constitution." If Congress had intended to refer to less

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[21] This case does not require a definitive determination of each constitutional provision included within § 1983. Initially, § 1983 only extends to those provisions as to which Congress is granted enforcement powers. The logic of *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), suggests that the inclusion of Supremacy Clause claims relates to the scope of the "and laws" provision rather than the "Constitution." There further are constitutional provisions, such as the Ninth Amendment, which may be too indefinite to be a source of enforceable rights. *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1 (1981). Article III and prudential considerations such as those raised by standing and political question limitations also will limit the scope of the § 1983 remedy.

than all of the Constitution, it easily could have specified the constitutional provisions to be included within the scope of § 1983. There similarly is no basis in the statutory language to read restrictively the word "secured." The phrase "secured by the Constitution" may be "fairly read" to refer to any federal rights which are created, protected or merely accorded priority over conflicting state law. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. at 612-13. Indeed, the Constitution uses the word "secure" in this broad sense in the preamble and this meaning was likewise intended in § 1983. *Id.* at 613 n.29 (quoting *Hague v. C.I.O.*, 307 U.S. 496, 526-27 (1939) (Stone, J., concurring)). The only substantial interpretive issue accordingly is the scope of the "rights, privileges and immunities" which were intended to be secured.

The Department's efforts to demonstrate that the Commerce Clause only allocates power between state and federal sovereigns have limited relevance to this inquiry. The Commerce Clause clearly is allocational in its grant to Congress of plenary authority over interstate commerce—a power which presumably includes the ability to provide a remedy for voiding discriminatory state regulation. *See Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989). The question thus is limited to a determination of Congressional intent.

Furthermore, the implicit assumption that allocational provisions do not also protect individual rights is mistaken. The separation and allocation of powers is the foundation of a constitutional scheme for the protection of liberty. *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986). The Commerce Clause provides Congress with authority over the individual states in order to promote national economy and prevent the evils of economic balkanization. The fact that a purpose of the Commerce Clause is to "protect a [national economy] and not private entities or individuals," however, does not

mean that the constitutional provision does not protect an individual interest. *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1507 (1989) (recognizing personal interest protected by intergovernmental tax immunity doctrine). "[I]t does not follow that private entities or individuals who are subjected to discriminatory [regulation] on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine." *Id.*

It is apparent that the Commerce Clause—like the intergovernmental tax immunity doctrine—must in some sense protect or create an entitlement for private litigants. The existence of Commerce Clause litigation establishes that private parties have standing to complain of discriminatory state legislation. The existence of standing necessarily requires an alleged violation of plaintiff's rights or "zone of interests" before a federal court can exercise jurisdiction under Article III.[22] An unbroken century of precedent recognizes that the Commerce Clause shields persons from protectionist state regulation, as follows:

> The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business . . . [The individual members of the exchanges] suffer an actual injury within the zone of interests protected by the Commerce Clause . . . . *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977).

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[22] The NCSL brief at 23 confusingly cites *Clarke v. S.I.A.*, 479 U.S. 388, 400 n.16 (1987) and suggests that satisfaction of standing requirements does not necessarily mean that Congress has provided a cause of action. The issue, however, is whether persons may be deprived of rights under the Commerce Clause for which Congress has provided a remedy.

The first, and most obvious, [discrimination] is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected . . . *Hunt v. Washington State Apple Growers Comm'n,* 432 U.S. at 350-51.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967).

[I]n a leading case, *State of Oklahoma v. Kansas Natural Gas Co.,* 221 U.S. 229, . . . the Court . . . held that . . . the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it. *H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 535 (1949).

[The State] imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. *Buck Stove & Range Co. v. Vickers,* 226 U.S. 205, 216 (1912).

But the statute, requiring the corporation . . . to surrender a right and privilege secured to it by the Constitution and laws of the United States was unconstitutional and void . . . *Western Union Tel. Co. v. State of Kansas ex rel. Coleman,* 216 U.S. 1, 36 (1910).

To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless congress should see fit to interpose some contrary

regulation on the subject. *Crutcher v. Com. of Kentucky,* 141 U.S. 47, 57 (1891).

Once it is acknowledged that dormant Commerce Clause claims secure legal entitlements, a principled analysis of statutory language does not permit restriction of the scope of "any rights, privileges and immunities" to exclude Continental's claims. There is no colorable basis to interpret this phrase as limiting language or to require a broader list of entitlements. The Department notes that there are four types of legal entitlements — "rights", "privileges", "immunities" and "powers" — and relies on the absence of "powers secured by the Constitution" in the listing of entitlements secured by § 1983 as its basis for claiming that the statutory language excludes dormant Commerce Clause claims. (Department's Br. 44 n.110). Normal English usage does not readily permit reference to the Department's misconduct as having subjected Continental to the "deprivation of powers secured by the Constitution." A plain meaning analysis of the statutory language thus demonstrates that § 1983 provides a remedy for dormant Commerce Clause claims.

2. *Statutory Purpose:* In *Monroe v. Pape,* 365 U.S. 167, 173-74 (1961), the three purposes underlying the enactment of § 1983 were determined to be (1) to override discriminatory state laws; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory was not available in practice. Inclusion of dormant Commerce Clause claims within the scope of § 1983 evidently serves these purposes. A dormant Commerce Clause claim by definition concerns discriminatory state regulation. Due to the parochial state interest, there also is little question that such claims will frequently arise in a context where a federal forum is

required because the state remedy is either inadequate or not available in practice.

3. *Legislative History and Other Historical Evidence:* Numerous decisions of this Court have engaged in exhaustive analysis of the congressional debates on § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the statutory predecessor to § 1983. This analysis has not revealed any compelling basis to require that the "deprivations of any right, privilege or immunity secured by the Constitution" be limited to the post-Civil War Amendments. Although there is clear intent to provide a remedy for deprivations of rights secured by the Fourteenth Amendment, it also appears that this was not the only portion of the Constitution at issue. The primary concern instead was to provide a remedy for state invasion of federally-protected rights. *Monell v. Dep't of Social Services*, 436 U.S. 658, 700-01 (1978).

To the extent comment was made, both sponsors and opponents stressed the breadth of the statutory language and the intent that it be interpreted broadly and liberally with "the largest latitude consistent with the words employed." *Id.* at 684 (quoting Rep. Shellabarger). Even the opponents to enactment of 1983 recognized that:

> It authorizes any person who is deprived of any right, privilege or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in Federal Courts,*** *[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used.*

Id. at 685 n.45 (Court's emphasis). *See also Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987) ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy") (quoting *Smith v. Robinson*, 468 U.S. at 1012); *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980) (§ 1983 legislative history confirms "the expansive sweep of the statutory language"); *U.S. v. Price*, 383 U.S. 787, 797, 800 (1966) (construing 18 U.S.C. §§ 241-42). The decisions of this Court recognize that the sparse legislative history is insufficient to permit restriction of otherwise plain statutory language. *E.g., Maine v. Thiboutot*, 448 U.S. 1 (1980). Because the legislative history does not compel a contrary conclusion, § 1983 should be read in accordance with its plain language to include all of the Constitution within its scope.

Employing legislative history to determine whether to restrict the scope of plain statutory language is of little value for more fundamental reasons. The legislative history of the 1871 Act reveals an intent to provide a remedy for deprivation of the "natural" or inalienable rights of man as described in the Declaration of Independence and interpreted by Justice Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823). *See, e.g., Hague v. C.I.O.*, 307 U.S. at 511. It is the virtually unanimous consensus of historians that constitutionalizing these rights and making them applicable to the states was the primary purpose of the Privileges and Immunities Clause in the Fourteenth Amendment.[23] A broad interpretation of the

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[23] *E.g.*, W. NELSON, THE FOURTEENTH AMENDMENT 163-64 (1988); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 546-53 (2d ed. 1988); Collins, *"Economic Rights" Implied Constitutional Actions and the Scope of § 1983*, 77 Geo. L. J. 1493, 1501 (1989); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1223, 1333 (1951); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U.L. Rev. 863, 910-17 (1986); Notes, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right to be Free of Protectionist State Action*, 86 Mich. L. Rev. 157, 176 (1987).

Privileges and Immunities Clause, however, was rejected in *In re Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The natural rights theory "was discarded long ago." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 n.10 (1985). The decisions of this Court accordingly effectively ignore this legislative intent. Any reliance on legislative history to restrict the scope of the "rights, privileges and immunities secured by the Constitution" which does not employ the conceptual framework of natural law jurisprudence thus appears suspect.[24]

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[24] The Department and every lower court which rejects inclusion of dormant Commerce Clause claims within § 1983 heavily rely on a comment by Rep. Shellabarger which is interpreted to mean that "allocational" constitutional provisions were not intended for inclusion. (Dept. Br. 43 n. 109). This reliance is questionable in that (1) the comment is not part of the congressional debates on § 1 of the 1871 Act and instead occurred during debates with limited utility as interpretive aids as to the scope of § 1983, *Monell*, 436 U.S. at 665-67, 670-72; (2) in contrast to the Commerce Clause, the reference is to Art. I, Cl. 10 provisions which do not explicitly provide Congress with enforcement powers; and (3) Shellabarger plainly believed that he was constitutionalizing "natural" rights, not engaging in theorizing regarding allocational perspectives on the Constitution. *See* note 23, *supra*. Further, to the extent Shellabarger and other leading Republican legislators relied on *Prigg v. Pennsylvania*, 41 (16 Pet.) 539 (1842), as recognition of Congressional authority to enforce the Constitution through the Fourteenth Amendment, dormant Commerce Clause claims are enforceable under the Fourteenth Amendment. *See* Kaczorowski, *supra*, 61 N.Y.U.L.R. at 913; Collins, *supra*, 77 Geo. L.J. at 1544-48; *cf. Jett v. Dallas Ind. School District*, 109 S. Ct. 2702, 2718-19 (1989) (recognizing importance of contemporary understanding of *Prigg*).

In this regard, "rights, privileges and immunities" probably were understood to include dormant Commerce Clause claims. The natural rights of man included an inherent right to engage in interstate commerce. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824) (right of commercial intercourse "derives its source from those laws whose authority is acknowledged by civilized man throughout the world"). The "right of a citizen of one state to pass through, or reside in any other state, for the purpose of trade" is one of the fundamental rights listed by Justice Washington in *Corfield*, 6 Fed. Cas. at 552. The statutory phrase "rights, privileges and immunities" in the 1871 Act was adopted by a Congress which had recently copied that phrase from Article IV of the Constitution in enacting the Fourteenth Amendment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 550 (2d ed. 1988). Both the Commerce Clause and the Article IV Privileges and Immunities Clause were derived from Article IV of the Articles of Confederation which specifically discussed the personal right to engage in interstate commerce:

> the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . . .

Supreme Court of New Hampshire, 470 U.S. at 279-811 n.7.

The similarity of the textual language indicates that rights secured by the Article IV Privileges and Immunities Clause are within the scope of § 1983.[25] In decisions under the Privileges and Immunities Clause, "this Court repeatedly has found that 'one of the privileges which the clause guarantees to citizens of State A is that of doing business in

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[25] *See Friedman v. Sup. Ct. of Va.*, 822 F.2d 423, 424 (4th Cir. 1987) (Art. IV claims brought under § 1983), *aff'd*, 108 S. Ct. 2260 (1988).

State B on terms of substantial equality with the citizens of that state.'" *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 280 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). Given the common aims, common derivation from Article IV of the Articles of Confederation and "mutually reinforcing relationship" of the Privileges and Immunities Clause and the Commerce Clause, *id.* at 280 n.8, it is difficult to believe that Congress intended in § 1983 to provide individuals with a remedy for conduct made unconstitutional by the Privileges and Immunities Clause while intending to omit the creation of a remedy for corporations for identical conduct condemned by the Commerce Clause. The word "person" in § 1983 includes corporations, *Monell v. Department of Social Services*, 436 U.S. at 689-90, and this distinction between the two clauses thus is irrelevant to the scope of § 1983.

4. *This Court's Precedent:* Prior decisions of this Court indicate that § 1983 should be construed to provide a remedy for deprivation of all constitutional rights rather than limited to those ennumerated in the post-Civil War amendments. *In Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 n.16 (1972), this Court emphasized that the "rights, privileges, or immunities secured . . . by the Constitution" includes rights under "*all* of the Constitution." (quoting *U.S. v. Price*, 383 U.S. at 797). *Price*, in its interpretation of the analogous language in 18 U.S.C. § 241, with even greater clarity held that the "purpose and effect" was to "reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it." *Id.* at 805.

Maine v. Thiboutot stresses the plain meaning of § 1983 and expressly finds the legislative history inadequate to alter the statutory language. 448 U.S. at 7-8; *see also* 448 U.S. at

25 n.15 (Powell & Rehnquist, JJ., Burger, C.J., dissenting) (dissent does not mean to imply § 1983 strictly limited to post-Civil War Amendments). This emphasis on plain meaning analysis is followed in numerous other decisions construing post-Civil War legislation. *E.g., Chapman*, 441 U.S. at 649 (White, J., concurring) (citing cases).

Although *Maine v. Thiboutot* addresses the scope of the "and laws" provision, its holding that § 1983 provides a remedy for violation of laws passed pursuant to the spending power also renders questionable any attempt to restrict the scope of § 1983 to less than all of the Constitution. It is unlikely that Congress intended to provide a remedy for violations of "laws" enacted pursuant to Commerce Clause power but not for direct violations.[26] *See Chapman*, 441 U.S. at 667 n.43 (White, J., concurring).

The contrary precedent cited by the Department is not persuasive. *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939), is a summary affirmance of a brief trial court opinion which apparently found that the predecessor statute to 28 U.S.C. § 1343(3) did not provide jurisdiction for a Commerce Clause challenge to the creation of a state licensing scheme because there was "no claim or evidence" of the deprivation of any right under § 1983 (then § 1979). The decision thus may reflect plaintiff's failure to sufficiently plead a factual basis for his claim and

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[26] Many of the significant advances in protecting individual rights have been founded on the Commerce Clause, either as a source of legislative power, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); or by its own power, *Morgan v. Virginia*, 328 U.S. 373 (1946). Congressional intent to limit its remedy for state violation of federal rights to only federal statutory rights seems implausible.

further may be influenced by the distinction between personal and property rights to define the scope of § 1983 then being urged by Justice Stone in *Hague v. CIO*, 307 U.S. 496.

The citation of *Carter v. Greenhow*, 114 U.S. 317 (1885), for a holding that Contract Clause claims are not "secured by the Constitution" is dubious because it applied then current doctrine, which similarly excluded claims under the Due Process and Equal Protection Clauses which were derived from state law. *See Collins, supra*, 77 Geo. L.J. at 1503-06. *Carter* also may only concern pleading deficiencies. *Chapman*, 441 U.S. at 613 n.29. This decision also can be distinguished from the Commerce Clause context as a determination that Congress does not have enforcement power as to violations of the Contract Clause.

The Department's characterization of *Bowman v. Chicago & N.W. Railroad Co.*, 115 U.S. 611 (1885), as a decision holding that the Commerce Clause does not secure rights within the scope of § 1983, simply misreads the decision. Bowman did not sue the state to invalidate a tariff allegedly in violation of the Commerce Clause but instead sued the railroad company for its enforcement of the tariff and thus merely stated a claim under a state statute.

5. *Prudential Considerations:* There are numerous prudential considerations which strongly counsel inclusion of dormant Commerce Clause claims within the scope of § 1983. As recognized by the Solicitor General, a contrary ruling will require the Court to develop a manageable test for which constitutional provisions secure "rights, privileges or immunities" and which do not (U.S. Br. 19-20). *Amicus* directly suggests creation of a test which differentiates between constitutional rights which "specially" or "incidentally" benefit individuals (NCSL Br. 24, 28). After a thirty-year struggle in the lower courts to create a coherent standard, this Court rejected any distinction between personal and economic constitutional rights. *Lynch v. Household Finance Corp.*, 405 U.S. at 542; *see Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986) (rejecting a two-tiered concept of constitutional rights). Instead of reviving this Constitutional debate, it seems preferable to simply acknowledge the scope of the statutory remedy. Congress can always amend the statute.

The exclusion of enforceable constitutional rights from the scope of § 1983 further will result in the vast expansion of *Bivens*-type actions implied directly under the Constitution. *Bivens* actions essentially now function as the federal law analogue for conduct covered by § 1983 if performed under color of state law. The expansion of *Bivens*-type actions to other contexts, however, will substantially diminish the utility of the ready reference to § 1983 jurisprudence and create a host of new issues requiring resolution by the courts. To the extent this issue only concerns entitlement to attorneys' fees under 42 U.S.C. § 1988, Congress again can address any abuses through amendment of that statute.

A finding that dormant Commerce Clause claims are not within § 1983 also will foreseeably implicate the question of Congressional power to deprive the lower federal courts of jurisdiction to hear constitutional claims. Section 1983 is one of the "expressly authorized exceptions" to the Anti-Injunction Act, 28 U.S.C. § 2283. *Mitchum v. Foster*, 407 U.S. 225 (1972). While any constitutional claims excluded from § 1983 presumably may be brought as *Bivens*-type actions, it is difficult to conceive that an implied remedy may be deemed "expressly authorized." In the context of dormant Commerce Clause claims, this issue is particularly important due to the frequency with which parochial state legislation is addressed in both state and federal court in the context of tender offer litigation. *E.g., Kennecott Corp. v. Smith*, 637 F.2d at 186. Such litigation then could only be

brought in state court subject to ultimate review by this Court.

Finally, inclusion of dormant Commerce Clause claims within the scope of § 1983 and the attorneys' fee provision of § 1988 is the only effective means to deter continued defiance of the Constitution. Dormant Commerce Clause claims are brought against state actors otherwise immune from damages under the Eleventh Amendment. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989). This case provides a vivid illustration of the domination exerted by parochial state economic interests and the necessity for a countervailing deterrent. On this record, the Department's claim that attorneys' fees will have a "chilling effect" on legitimate regulation is offensive.

CONCLUSION

For the reasons stated above, this appeal should be dismissed or the decision of the Court of Appeals affirmed.

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REPLY

BRIEF

No. 87-1955

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-1955

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

v.

CONTINENTAL BANK CORPORATION and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR APPELLANT

STATEMENT

Appellees (hereafter "Continental") and *amicus* New York Clearing House Association ("NYCHA") devote much of their argument to an attack on the State of Florida for its alleged pursuit of "an adamant policy against competition by out-of-state (now out-of-region) bank holding companies."[1] In truth, Florida's banking statutes favor competition as well as other legitimate state concerns, such as the preservation of an unconcentrated banking industry that is responsive to the needs of Florida consumers and businesses for banking services.

[1] NYCHA Brief 6; *see* Continental Brief ("Cont. Br.") 23-25.

These state interests have long been affirmed as valid both by Congress and by this Court.[2]

Continental and NYCHA base their allegations of bad faith primarily on Florida's purported refusal to abide by this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). In *BT Investment* this Court held that Florida could not constitutionally prohibit *only* out-of-state bank holding companies from establishing nonbanking investment advisory subsidiaries in Florida. Continental and NYCHA ignore, however, that this case has presented much different issues than *BT Investment*. This case has turned on the issues of (i) whether Continental's proposed industrial savings bank ("ISB") would *in fact* be a nonbanking subsidiary within the meaning of Section 4(c)(8) of the Bank Holding Company Act ("BHC Act"), 12 U.S.C. § 1843(c)(8), (ii) whether Florida could prohibit, in Fla. Stat. § 658.29 (1), the acquisition by out-of-state bank holding companies of *deposit-taking* "nonbank banks" such as Continental's proposed ISB, and (iii) whether Florida could deny, under Fla. Stat. § 664.02, further ISB charters to *all* in-state *and* out-of-state persons. *BT Investment* did not decide these issues.[3]

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[2] For example, in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985), this Court expressly recognized "the historical fact that our country traditionally has favored widely dispersed control of banking," and that federal laws regulating the acquisition of banks by bank holding companies have "retain[ed] local, community-based control over banking." *Id.* at 177, 172. *See* Lewis Brief ("Lewis Br.") 28-33.

[3] Continental makes much of the Florida's legislature's reenactment of Fla. Stat. § 659.141(1) following this Court's decision in *BT Investment*. Yet, as Continental reluctantly acknowledges at page 8 of its brief, the statutes at issue in *BT Investment* were due to expire on July 1, 1980, and the failure to reenact those statutes would have mooted the case before the District Court could act following remand by this Court. *See* 447 U.S. at 53 n.15; Answer Brief of Gerald A. Lewis in Case No. 85-3949 at 17-19 (11th Cir., dated Sept. 6, 1986).

The underlying legal and policy issue that triggered this proceeding was whether Continental and other non-Southeastern bank holding companies would be permitted to evade the clear intent of Section 3(d) of the BHC Act (the "Douglas Amendment"), 12 U.S.C. § 1842(d), by acquiring nonbank banks in Florida without Florida's permission. As described below, that issue engaged the attention of this Court in two major cases that were litigated during the pendency of this proceeding. Congress finally answered the question in the negative in August 1987, when it closed the nonbank bank loophole and subjected all further acquisitions of FDIC-insured banks to the requirements of the BHC Act, *including* the prohibition on interstate bank acquisitions without state authorization under the Douglas Amendment. *See* Lewis Br. 30-31.

In view of this parallel history of Supreme Court litigation and congressional action, Florida cannot be faulted for having contested in good faith whether Continental's ISB, which proposed to accept FDIC-insured deposits, was a "nonbanking" subsidiary for purposes of Section 4(c)(8) of the BHC Act or instead was a "bank" within the scope of the Douglas Amendment. Nor, in view of the regulatory authority reserved to the states under Section 7 of the BHC Act, 12 U.S.C. § 1846, can Florida be accused of bad faith for defending its even-handed statutory decision to prohibit the further granting of ISB charters to any person, including in-state *and* out-of-state bank holding companies. *See* Lewis Br. 22-23.

In an effort to recover attorneys' fees on appeal, Continental falsely accuses Lewis of having "unreasonably and vexatiously multiplied the appellate proceedings" in this case. Cont. Br. 30.[4] However, the record shows that

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[4] Continental also asserts that Lewis failed to file a responsive brief with the Court of Appeals with regard to Continental's motion for attorneys' fees on appeal. However, Continental's motion consisted *in its entirety* of a *two-sentence request* that contained no allegation of bad faith conduct by Lewis during the appeal. The

Continental *agreed* to stay the appellate proceedings in July 1985 so that the issue concerning the validity of Fla. Stat. § 658.29(1) could be determined in light of the ongoing litigation in the *Dimension*[5] and *U.S. Trust*[6] cases. While the stay expired in February 1986, following this Court's decision in *Dimension*, the final order in *U.S. Trust* (*viz.*, this Court's denial of certiorari, 481 U.S. 1013) was not entered until April 20, 1987, only five months before the Court of Appeals entered its initial decision in *this* case.

U.S. Trust was of particular relevance to this case, presenting the issue of whether the Douglas Amendment prohibited the acquisition of deposit-taking nonbank banks by out-of-state bank holding companies *as a matter of federal law.*[7] Thus, the Court of Appeals could not reason-

motion merely relied on and "incorporate[d]" the brief Continental had filed with the Court of Appeals in Continental's appeal (Case No. 85-3949) from the District Court's denial of attorneys' fees. Motion of Continental for Attorneys' Fees in Case Nos. 85-3949 and 85-3165 (11th Cir., dated Oct. 9, 1987), para. 2. Because Lewis had filed a brief *opposing* Continental's appeal, there obviously was no need for Lewis to file another brief in response to Continental's motion.

[5] *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

[6] *U.S. Trust Corp.*, 70 Fed. Res. Bull. 371 (1984), *reversed sub nom. Florida Dept. of Banking and Finance v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985), *vacated and remanded sub nom. U.S. Trust Corp. v. Board of Governors*, 474 U.S. 1098 (1986), *on remand sub nom. Florida Dept. of Banking and Finance v. Board of Governors*, 800 F.2d 1534 (11th Cir. 1986), *cert. denied sub nom. Conference of State Bank Supervisors v. Board of Governors*, 481 U.S. 1013 (1987).

[7] Indeed, Lewis was at first *successful* before the Court of Appeals in *U.S. Trust* in arguing that the Douglas Amendment prohibited interstate acquisitions of nonbank banks. *See* 760 F.2d at 1141-44. Although *Dimension* did not specifically address the application of the Douglas Amendment to interstate acquisitions of nonbank banks, the Court of Appeals, upon remand following *Dimension* (*see* 474 U.S. 1098), felt constrained by *Dimension*'s

ably have been expected to act in this case until *U.S. Trust* had been finally resolved. Moreover, because *U.S. Trust* expressly did *not* pass on the validity of Fla. Stat. § 658.29(1), which had been invoked by Lewis,[8] the issue as to the constitutionality of Section 658.29(1) properly remained before the Court of Appeals for decision in *this* case.

Beyond the continuing issue raised by Fla. Stat. § 658.29(1), the constitutionality of Fla. Stat. § 664.02 was not affected by the decisions in *Dimension* and *U.S. Trust* and remained a live controversy for determination by the Court of Appeals. Lewis was clearly entitled, therefore, to litigate these issues before the Court of Appeals, and there is no foundation for Continental's claim that he has done so in bad faith.[9]

ARGUMENT

1. *The Mootness Issue.* Continental admits that its original application to establish an FDIC-insured ISB is now barred by the Douglas Amendment. Cont. Br. 18-19. Continental seeks to avoid mootness by making the highly

reasoning to hold that the Douglas Amendment did not bar such acquisitions. *See* 800 F.2d at 1536-37. Nonetheless, the initial victory of Florida in *U.S. Trust* and its ultimate success in helping to persuade Congress to close the "nonbank bank loophole" in August 1987 (*see* Lewis Br. 31 n.78) attest to the State's good faith in opposing Continental's application for an ISB.

[8] In *U.S. Trust*, Lewis maintained that Fla. Stat. § 658.29(1), as well as the Douglas Amendment, barred out-of-state bank holding companies from acquiring deposit-taking nonbank banks in Florida. *See U.S. Trust Corp.*, 70 Fed. Res. Bull. 371 (1984). The Court of Appeals, however, did *not* pass on the validity of Section 658.29(1) in its decisions in *U.S. Trust*. *See* 760 F.2d at 1144, 800 F.2d at 1535-37.

[9] The Court of Appeals made *no* finding as to any bad faith conduct of Lewis on appeal. In the absence of any such finding, the Court of Appeals could not properly have awarded attorneys' fees as a sanction. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

equivocal statement that it intends to apply for one or more *uninsured* ISBs if it prevails in this case *and* "provided conditions at that time warrant such proposals." *Id.* at 19-20. Given the remarkably conditional nature of Continental's stated intent, and the dubious prospect of customers actually choosing to place uninsured deposits with a subsidiary of Continental,[10] Lewis submits that Continental has *not* avoided mootness by the required showing of a "reasonable expectation" that it will apply for an uninsured ISB.[11]

2. *The Commerce Clause Issue.* Continental does not dispute that the purpose of Fla. Stat. § 664.02 was to respond to "growing concern over the use of industrial savings banks to circumvent restrictions on interstate banking."[12] It is also undisputed that Fla. Stat. § 664.02 was enacted only a few weeks after the Florida legislature adopted a regional interstate banking statute (Fla. Stat. § 658.295), which was based on extensive studies concerning the impact on Florida of interstate banking

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[10] *See* Lewis Br. 16 (public would not be likely to respond favorably to solicitations for uninsured deposits by an ISB owned by Continental, since Continental's very survival has been due to the largest FDIC bailout in history).

[11] *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). It is useful to contrast the carefully hedged statement by Continental as to its intent (assuming it prevails in this case) even to *apply* for an uninsured ISB with the substantial and continuing interests demonstrated in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987), and *Honig v. Doe*, 108 S. Ct. 592, 601-02 & n.6 (1988). The only tangible continuing interest shown by Continental in this case is its claim for attorneys' fees, and that claim is not sufficient to provide continued jurisdiction in this Court. *See* Lewis Br. 18 n.46.

If the Court is in doubt as to the mootness issue in light of Continental's cryptic representations, the decision of the Court of Appeals should be vacated and remanded for development of a factual record on the issue. *Fusari v. Steinberg*, 419 U.S. 379, 386-90 (1975); *see BT Investment*, 447 U.S. at 51-53.

[12] Cont. Br. 11 (quoting Joint Appendix ("J.A.") 31).

activities.[13] Thus, Continental has not refuted the legitimate local purposes underlying the adoption of Fla. Stat. § 664.02—*viz.*, to preserve the integrity of Florida's regional banking approach and, thereby, to provide a competitive banking environment in Florida that would be responsive to the credit needs of Florida's businesses and consumers.[14]

Nor has Continental disproved the fundamental point that Fla. Stat. § 664.02, by denying further ISB charters equally to in-state and out-of-state applicants, is nondiscriminatory in both its terms and practical effects.[15] The only "discrimination" shown by Continental and

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[13] Lewis Br. 28-31, 34. Continental claims (Cont. Br. 26) that only "the accident of timing" links Fla. Stat. § 664.02 with Fla. Stat. § 658.295. However, the close connection between the two statutes is obvious in view of their immediate proximity in time, the similarity of their subject matter, and the established canon of statutory construction providing that a legislature is deemed to act in light of recent actions taken by it and information presented to it on issues relevant to the legislation in question. *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972).

[14] Lewis Br. 28-29. Continental argues that Florida's "regional banking concerns" could not provide a "factual basis" for Fla. Stat. § 664.02, in view of Lewis' contention that the statute has an "incidental, *de minimis* impact on interstate commerce." Cont. Br. 26. Continental ignores the fact that both the Court of Appeals (in its initial decision in *U.S. Trust*) and Congress (in acting to close the nonbank bank loophole in 1987) fully *agreed* with Florida that the interstate acquisition of nonbank banks threatened to subvert regional banking statutes such as Fla. Stat. § 658.295. *See* Lewis Br. 29-31 & nn.75-78. Moreover, a nondiscriminatory state statute such as Fla. Stat. § 664.02 lawfully may have an incidental impact on interstate commerce even though it hinders or *completely bars* certain out-of-state suppliers. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-29 (1978).

[15] This Court's decisions plainly refute Continental's claim (Cont. Br. 25) that "discriminatory effects" are present because Fla. Stat. § 664.02 "grandfathered" three existing ISBs (all of which have since been converted into other types of financial institutions). *See Clover Leaf Creamery*, 449 U.S. at 465-68, 472-73 (rejecting equal protection and commerce clause challenges to Minnesota statute

NYCHA is that non-Southeastern bank holding companies may not acquire *full-service* Florida banks while Southeastern bank holding companies may do so under Fla. Stat. § 658.295. That "discrimination," however, has been authorized by Congress under the Douglas Amendment and is therefore lawful. *Northeast Bancorp*, 472 U.S. at 174-75. In the absence of the Douglas Amendment, there could be no doubt as to the entirely even-handed impact of Fla. Stat. § 664.02. It therefore cannot be said that the statute creates any additional discrimination that does not already exist by reason of the Douglas Amendment.[16]

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that banned the use of recently-introduced plastic milk containers, even though the statute permitted the continued use of long-established paperboard milk containers that were alleged to cause equal or greater harm to the environment); *New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976) (rejecting equal protection clause challenge to city regulation that prohibited pushcart vendors while grandfathering two existing vendors.)

Continental's reliance on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), is clearly misplaced, as the nature of the statute invalidated in *Hunt* was fundamentally different from Fla. Stat. § 664.02. *See* Lewis Brief in Opposition to Cont. Motion to Dismiss or Affirm ("Lewis Opp. Br.") at 14-15 n.16.

[16] *See* Lewis Br. 25. Lewis has maintained (*id.* at 30-31), without contradiction from Continental or NYCHA, that the commerce clause does not require Florida to create *new* state-chartered deposit-taking institutions to enable non-Southeastern bank holding companies to evade the "discrimination" authorized by the Douglas Amendment. For the same reason, it cannot be a violation of the commerce clause for Florida to withdraw, on an even-handed basis, an existing charter option in order to defend the integrity of its regional banking program.

In arguing that Fla. Stat. § 664.02 is an *independent* source of discrimination against non-Southeastern bank holding companies, Continental and NYCHA rely upon *Chemical New York Corp.*, 73 Fed. Res. Bull. 609 (1987), *appeal pending sub. nom. Lewis v. Board of Governors*, No. 87-3455 (11th Cir.) In *Chemical* the Federal Reserve Board ("FRB") determined that Fla. Stat. § 658.296, which in effect bans acquisitions of nonbank banks by *any* company, was

Moreover, Continental does not dispute (Cont. Br. 25) that Fla. Stat. § 664.02 has had *no* impact on the large volume of interstate banking services (including deposit services) that Continental and other non-Southeastern bank holding companies have furnished to Florida residents using vehicles other than ISBs. *See* Lewis Br. 33-37. These interstate opportunities, which have recently been *expanded* by Congress,[17] clearly demonstrate that Fla. Stat. § 664.02 does not place an undue burden on interstate commerce.

3. *The Attorneys' Fee Issue.* To recover attorneys' fees under 42 U.S.C. § 1988 based directly upon its commerce clause claims, Continental must show that a violation of the dormant commerce clause is cognizable under 42 U.S.C. § 1983.[18] Section 1983 provides a federal rem-

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discriminatory as applied to non-Southeastern bank holding companies that could not acquire full-service banks in Florida by reason of the Douglas Amendment. However, the FRB found that § 658.296 did *not* discriminate against any nonbanking companies or against Southeastern bank holding companies that are exempted from the Douglas Amendment by reason of Florida's regional banking program. *See* 73 Fed. Res. Bull. at 610-11 & n.10, 613-14. Thus, it is evident from the FRB's findings that § 658.296 (like § 664.02) has *no* independent discriminatory impact, and that the "discrimination" complained of in both *Chemical* and this case is solely the result of the Douglas Amendment. *See* Lewis Br. 25, 32 n.79.

[17] Under Section 601 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), enacted on August 9, 1989, bank holding companies are now permitted to acquire healthy *or* failing savings and loan associations ("S & L's") in *any* state in accordance with Section 4(c)(8) of the BHC Act. Pub. L. No. 101-73, § 601, 103 Stat. 183, 408-09 (to be codified at 12 U.S.C. § 1843(i)). Previously, bank holding companies could acquire *only* failing or failed S & L's (Lewis Br. 35). Thus, under FIRREA non-Southeastern bank holding companies now have an even broader opportunity to obtain deposits in Florida without regard to Fla. Stat. § 664.02. Under this Court's precedents, the effects of Section 664.02 on interstate commerce should be evaluated in light of this important recent change in federal law. *E.g., Fusari v. Steinberg*, 419 U.S. at 387.

[18] To recover attorneys' fees under Section 1988, Continental must also show that it is a "prevailing party." Notwithstanding the

edy for a "deprivation [under color of state law] of any rights, privileges or immunities secured by the Constitution and laws." Lewis submits that Continental's ability to sue as an incidental beneficiary under the commerce clause to enforce federal supremacy over interstate commerce is in no sense a constitutional "right" protected by Section 1983. Lewis' position best reconciles the language, history, and policy of both Section 1983 and the commerce clause; while Continental's interpretation would mark a radical departure from the established meaning of both provisions.

A. The literal terms of the commerce clause do not grant Continental any "right, privilege, or immunity" to engage in interstate commerce within the meaning of Section 1983. Instead, the clause vests the federal government with the plenary "power" to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. Ever since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court has enforced the commerce clause not as an individual constitutional "right" granted to market participants, but rather as a device to preserve harmony among the states.[19] In challenging state action under the commerce clause, market participants act as private attorneys general with standing to assert derivatively against offending states the federal power to preserve a national economy.[20]

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decision in its favor below, Continental is *not* a prevailing party if this Court upholds the validity of Fla. Stat. § 664.02 or otherwise finds that this case has become moot. Lewis Br. 49-50. Continental has not disputed this point.

[19] *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949) (purpose of commerce clause was to promote competition and the free flow of commerce so as to prevent "economic isolation" and ensure that "our economic unit is the Nation"); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("a chief occasion of the commerce clause was 'the mutual jealousies and aggressions of the States' ").

[20] *See* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 46 (1988). Continental states that *Gibbons* recognized "an inherent [*i.e.*, natural] right" to engage in interstate commerce.

Continental argues that because it has "standing to complain of discriminatory state legislation," it therefore enjoys a constitutional "right," the violation of which may be remedied under Section 1983. Cont. Br. 37-39. This contention amounts to no more than a play on the multiple meanings of the word "right."[21] Lewis does not contest Continental's standing to file this action or disagree with the general proposition that private litigants enjoy an "entitlement" to sue to enforce constitutional provisions—like the intergovernmental tax immunity doctrine and the dormant commerce clause—that allocate powers between federal and state governments. *E.g., Davis v. Michigan Dept. of Treasury*, 109 S. Ct. 1500, 1507 (1989). Lewis maintains that Continental's "entitlement" to sue as an incidental beneficiary of the federal "power" over interstate commerce does not amount to a constitutional "right" that is guaranteed to and enforceable by a specified class of persons.[22] Accordingly,

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Cont. Br. 43. Continental ignores, however, Chief Justice Marshall's *other* statements in *Gibbons* holding that the Constitution subjects this "right" to the "plenary," "supreme" and "absolute" regulatory power of Congress. 22 U.S. at 196-97, 211-12. Thus, it is clear from *Gibbons* that what the Supreme Court was enforcing was the supremacy of congressional authority over inconsistent state regulation rather than any individual "right." *Id.* at 210-11.

[21] Continental's casual use of the term "right" is also shown by its contention that the separation of powers "protect[s] individual rights" (Cont. Br. 36). While the Court has repeatedly held that the separation of powers is intended to restrain the exercise of federal power in order to preserve "liberty" (*e.g., Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986)), it has *never* held that this aspect of our Constitution creates "rights" in the sense that term is used in Section 1983 (*i.e.*, constitutional guarantees specifically granted to and enforceable by a defined class of persons). *See infra* note 22 and accompanying text.

[22] *See Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423, 429-32 (1987) (federal housing statute created "enforceable rights" within the meaning of Section 1983, because there was clear evidence of congressional intent to confer "specific and definite" benefits on a defined class of persons, *viz.*, tenants of public

Continental's mere "entitlement" to sue under the commerce clause is not a "right" cognizable under Section 1983.

Lewis' plain meaning analysis is consistent with this Court's precedents. If dormant commerce clause claims were redefined as arising out of the violation of constitutional "rights" so as to bring them within the ambit of Section 1983, this Court would be required to rethink some of its most fundamental precedents. For example, it is well settled that Congress may choose to restrict interstate commerce by delegating to the states authority to adopt commercial regulations that would otherwise be struck down as undue burdens on interstate commerce. Such delegation is perfectly valid so long as it does not run afoul of other constitutional provisions, such as the due process and equal protection clauses.[22] This doctrine allowing Congress to delegate to the states federal power over interstate commerce would be difficult to justify if market participants in fact enjoyed a constitutional "right" to engage in such commerce. The logical extension of Continental's thesis would be to invalidate the Douglas Amendment.

Continental's assertion of a constitutional "right" to engage in interstate commerce also disregards the funda-

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housing projects); *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981) (Rivers and Harbors Act was "designed to benefit the public at large" and was *not* enacted "for the especial benefits of a particular class;" therefore, the Act granted *no* implied "rights" to private individuals to obtain a federal remedy for violations of the statute). *Cf. Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (plaintiff may have standing to sue for violation of a federal statute even when there is "no indication of a congressional purpose [in that statute] to benefit the would-be plaintiff").

[23] *E.g., Northeast Bancorp*, 472 U.S. at 174-75; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (McCarran Act delegates insurance regulation to the states and allows South Carolina to tax out-of-state insurance companies differently from local companies); L. Tribe, *American Constitutional Law* § 6-33 (2d ed. 1988).

mental *political* rather than economic purpose of the commerce clause.[24] A "rights" theory of the commerce clause would shift the analytical focus from the clause's clear purpose of preserving political union to Continental's suggested purpose of protecting the economic rights of individual market participants. Such an analytical shift could once again embroil the Court in reviewing the wisdom of state economic regulation as in the era of *Lochner v. New York*, 198 U.S. 45 (1905). Since the New Deal, this Court has consistently and emphatically rejected such a function.[25]

B. Continental's contention that Section 1983 embraces claims under the dormant commerce clause is contrary to the original purpose and subsequent applications of the statute. The parties do not dispute that the original purpose of Section 1983 was to provide a remedy for state invasion of federally-protected civil rights.[26] Continental, however, would define such "rights" in the

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[24] L. Tribe, *supra* note 23, § 6-7, at 417 (the dormant commerce clause is "derive[d] principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency.") (emphasis in original); *Baldwin*, 294 U.S. at 523 (purpose of commerce clause is to preserve "our national solidarity"); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93-94 (1987) (the commerce clause does not protect "the particular structure or methods of operation" in any market).

[25] *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963), where Justice Black wrote for the Court: "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the due process clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' "

[26] Cont. Br. 40 (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-01 (1978)). Continental implies (Cont. Br. 34-35) that Lewis argues that *only* the Civil War amendments create constitutional "rights" enforceable under Section 1983. In fact, Lewis maintains only that, *whatever* the full scope of constitutional "rights" enforceable under Section 1983, the dormant commerce clause does not create such a "right."

broadest possible terms to include all of the "natural rights" allegedly secured by the privileges and immunities clause of U.S. Const. art. IV, § 2, and incorporated in the privileges and immunities clause of the fourteenth amendment. Such rights, Continental asserts, include the right to engage in interstate commerce free from state discrimination. Cont. Br. 40-44.

Continental's thesis founders in two fundamental respects. First, this Court has never held that Section 1983 was intended to protect all "natural rights;" and for more than a century the Court has refused to interpret the privileges and immunities clause of the fourteenth amendment to encompass all these rights.[27] Second, even if the Court were to depart from precedent and broadly interpret Section 1983 as including all "natural rights," Continental has completely failed to demonstrate that such rights include the "right" to engage in interstate commerce free from any state discrimination. None of the historians cited by Continental (Cont. Br. 41 n.23) concludes that a dormant commerce clause claim asserts a fundamental human right protected by the fourteenth amendment and Section 1983.[28] Nor has this Court ever

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[27] *E.g., The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); L. Tribe, *supra* note 23, § 6-34.

[28] *E.g.*, W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 7-12, 118, 163-64 (1988) (fourteenth amendment intended to protect fundamental individual rights such as those guaranteed by the Bill of Rights, but only to the extent consistent with preserving local self-rule); Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1504-06 (1989) (respectable argument can be made that Congress intended to incorporate the express guarantees of the Bill of Rights in "privileges and immunities" language of fourteenth amendment and Section 1983); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 910-17, 934 (1986) (fourteenth amendment intended to overrule Supreme Court's refusal in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), to apply Bill of Rights to state governments).

Indeed, recent scholarship warns against transplanting to the Reconstruction era modern-day notions about the need to enforce

held that any asserted "right" to engage in interstate commerce is a *fundamental* right "implicit in the concept of ordered liberty" and therefore incorporated by the Bill of Rights or the fourteenth amendment.[29]

Lewis' analysis of Section 1983's plain meaning and purpose is confirmed by experience. In practice, Section 1983 has simply not been used to litigate dormant commerce clause claims. It was not until four years *after* Section 1983 was enacted that private parties began to litigate commerce clause claims as federal cases. *See* Act of March 3, 1875, § 1, 18 Stat. 470 (creating federal question jurisdiction) (codified as amended at 28 U.S.C. § 1331). Previously, dormant commerce clause claims were initiated in state courts and did not enter the federal system until reviewed by this Court. After 1875, litigants wishing to initiate dormant commerce clause cases in federal court invoked federal question jurisdiction, not Section 1983 and its jurisdictional counterpart.[30]

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federal dominance over commercial regulation. Professor Nelson, who is cited by Continental, stresses that the Reconstruction Congress was united in its recognition of the need to preserve local autonomy and did *not* intend to remove fundamental rights from the sphere of state control. Nelson, *supra* at 7-12. Professor Foner's recent study of the period concludes that the Republicans who dominated the Reconstruction Congress distrusted the prospect of an activist national government expanding its control over the economy. Thus, plans for a national bureau of health, a federal railway commission, and nationalization of the telegraph industry all died in Congress. So too did plans for regulating and financing public education. E. Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 451-52 (1988).

[29] For a recent discussion of the Court's cautious approach to the identification of fundamental rights "implicit in the concept of ordered liberty," *see Bowers v. Hardwick*, 478 U.S. 186, 190-95 (1986).

[30] Collins, *supra*, note 28, 77 Geo. L.J. at 1507-33, 1551; *see, e.g., Scott v. Donald*, 165 U.S. 58, 72-73, 101 (1897) (dormant commerce clause claim upheld under federal question statute); *cf. Carter v. Greenhow*, 114 U.S. 317, 322-23 (1885) (contracts clause does not secure individual rights within meaning of Section 1983; Congress intended such claims to be litigated in state courts, with review by

Even after the creation of federal question jurisdiction, many if not most commerce clause cases have continued to be brought in state court with the possibility of ultimate review in this Court.[31]

Thus, for over 150 years, private litigants have had adequate incentives and opportunities to litigate commerce clause claims.[32] Redefining these claims as vindications of constitutional "rights" triggering automatic awards of attorneys' fees under 42 U.S.C. §§ 1983 and 1988 will undoubtedly multiply such litigation. A proliferation of commerce clause litigation under Section 1983 would impose substantial financial burdens on state officials and would likely chill their willingness to experiment with new forms of regulation. Absent some clear directive from Congress that such an assault on the states' regulatory interests was intended by Sections 1983 and 1988, the Court should decline Continental's invitation to revolutionalize commerce clause litigation.[33]

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the Supreme Court, or in lower federal courts by reason of federal question jurisdiction). In certain circumstances commerce clause litigants could invoke diversity jurisdiction. *See* Collins, *supra* note 28, 77 Geo. L.J. at 1508, 1527; *see, e.g., McNeill v. Southern Ry. Co.*, 202 U.S. 543, 559 (1906).

[31] *E.g., Hood v. DuMond*, 336 U.S. at 529; *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 121-24; *Clover Leaf Creamery*, 449 U.S. at 460-61. In other cases, commerce clause claims were joined with other claims raising federal questions and could, therefore, have been heard in federal court under pendent jurisdiction. *E.g., CTS Corp.*, 481 U.S. at 72.

[32] Continental suggests that the Court should recognize commerce clause claims as Section 1983 claims to avoid a "vast expansion" of *Bivens*-type damage actions implied directly under the Constitution. Cont. Br. 47; *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The short answer to this suggestion is that no implied damages remedy has been considered necessary in commerce clause cases in view of the declaratory and injunctive relief that can be granted by federal courts for constitutional violations. 28 U.S.C. § 2201; *Ex parte Young*, 209 U.S. 123 (1908).

[33] Recent congressional pronouncements indicate its belief that Section 1983 does *not* provide a remedy for violation of the dormant

C. Continental contends that its commerce clause claims, even if not directly cognizable under Section 1983, are reasonably related to a substantial deprivation of equal protection or due process. Cont. Br. 31-34. Although equal protection and due process claims are actionable under Section 1983, the mere assertion of such claims "does not render automatic an award of fees for the entire proceeding." *Smith v. Robinson*, 468 U.S. 992, 1007-08 (1984). Rather these claims must provide "an alternative, but reasonably related basis, for the plaintiff's ultimate relief." *Id.* at 1008 n.10. In this case, Continental's equal protection and due process claims were never ruled upon by the District Court or Court of Appeals and are clearly without merit. Accordingly, neither claim provides an alternative basis for attorneys' fee liability.

This Court's decision in *Northeast Bancorp*, 472 U.S. at 177-78, is plainly dispositive of Continental's equal protection challenge. There, the Court held that, even where state regulation of interstate bank acquisitions on a regional basis "discriminate[d]" against out-of-region bank holding companies, nevertheless such state regulation *did* further a legitimate state purpose: *viz.*, to prevent undue concentration of power within the banking industry and to preserve local financial institutions responsive to local credit needs. Because Florida enacted Fla. Stat. § 658.29(1) (prohibiting acquisitions of local banks by out-of-state bank holding companies) and Fla. Stat. § 658.295 (permitting such acquisitions on a regional

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commerce clause. For example, in 1980 Congress eliminated the jurisdictional amount requirement for federal question cases in part because it doubted whether Section 1983 would reach non-fourteenth amendment claims, such as dormant commerce clause actions. *See* S. Rep. No. 827, 96th Cong. 2d Sess. 14 (1980) (Exhibit A, letter from Charles A. Wright to Rep. Kastenmeier) (unclear whether challenge to state action based on commerce clause or constitutional provisions other than the fourteenth amendment can be brought under section 1983); Collins, *supra* note 28, 77 Geo. L.J. at 1554 & n.308.

basis) for precisely this legitimate purpose, Continental cannot state a cognizable equal protection claim.

Florida's subsequent withdrawal of the chartering option for ISBs in Fla. Stat. § 664.02 similarly withstands equal protection scrutiny. The ban on the issuance of ISB charters has allowed Florida to preserve the integrity of its regional banking approach, thereby serving Florida's legitimate interest in promoting unconcentrated, competitive, and responsive financial institutions within the state.[34] Indeed, *Northeast Bancorp*, 472 U.S. at 177, and *BT Investment*, 447 U.S. at 38, both recognize that state regulation of "banking and related financial activities" is a matter of "profound local concern." So too is state regulation of the chartering and governance of corporations organized under state law. *CTS Corp.*, 481 U.S. at 89-94.

Continental's reliance on *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985), is misplaced. *Metropolitan Life* simply stands for the proposition that a state regulation that overtly favors local firms for the sole purpose of benefitting such firms does not advance a legitimate state purpose under equal protection analysis.[35] As the Court subsequently stressed in *Northeast Bancorp*, 472 U.S. at 177-78, state regulation of interstate bank acquisitions serves the legitimate purpose of preserving an unconcentrated and responsive banking environment within the state. The Court expressly distinguished this legitimate purpose from the type of naked protectionism struck down in *Metropolitan Life*.[36]

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[34] *Northeast Bancorp*, 472 U.S. at 172-73, 177-78; *see Clover Leaf Creamery*, 449 U.S. at 461-70 & 470 n.12 (upholding state statute that was reasonably related to legitimate state purposes against equal protection and due process challenges); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 124-25 (upholding statute on same grounds against due process challenge).

[35] *Metropolitan Life*, 470 U.S. at 878-80, 882-83; L. Tribe, *supra* note 23, § 16-2 at 1442-43 n.17.

[36] L. Tribe, *supra* note 23, § 6-33 at 526 n.34 & § 16-2 at 1442-43 n.17 (in view of *Northeast Bancorp*, *Metropolitan Life* should be confined to its peculiar facts).

Thus, Continental's equal protection claim is plainly without merit. Continental's due process challenge to the alleged "retroactive" application of Fla. Stat. § 664.02 (Cont. Br. 33) is also unfounded, because Florida's ban on the issuance of ISB charters was prospective only. Since Continental had never received even preliminary approval of its charter application prior to the enactment of Fla. Stat. § 664.02, there was no retroactive application of the statute with respect to Continental.[37]

CONCLUSION

For the reasons stated above and in Lewis' initial brief, the decision below should be reversed on the merits or, in the alternative, vacated and remanded on the ground of mootness.

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[37] Even if Florida's refusal to issue new ISB charters could be viewed in some sense to have applied "retroactively" to Continental, there would still be *no* due process violation. Under the due process clause, retroactive application of a statute need only be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The strong deference accorded legislation in the field of economic policy "is no less applicable when that legislation is applied retroactively." *Id.*

In enacting Fla. Stat. § 664.02, Florida determined (J.A. 13) that several out-of-state bank holding companies had applied for ISB charters as a means to evade the restrictions on interstate bank acquisitions as then enforced under the Douglas Amendment and Fla. Stat. § 658.295. By adopting Section 664.02 to preserve the integrity of its regional banking approach, Florida rationally furthered its legitimate interest in promoting unconcentrated and responsive banking institutions. *See Northeast Bancorp*, 472 U.S. at 172-78. That such "retroactive" application may have upset Continental's expectation of obtaining an ISB charter when it filed its application is irrelevant for due process purposes. *See Usery v. Turner Elkhorn Mining Co.*, 423 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, *etc.*,

Appellant,

v.

CONTINENTAL BANK CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

This brief is in support of appellees and is filed under Rule 36.2 of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of eleven leading commercial banks in the City of New York, each of which is owned by a bank holding company.[1] The Clearing House clears com-

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

mercial drafts and operates electronic transfer systems in the New York City area. From time to time as appropriate, the Clearing House appears as *amicus curiae* before courts of appellate jurisdiction in cases that raise important questions of law materially affecting banks or their affiliates.

The bank holding company organizations of which the Clearing House's members are a part have a strong and direct interest in being able to compete for deposits and for the provision of other financial services throughout the Union, free from discriminatory state regulation unauthorized by Congress.

Statement

1. Appellee Continental Bank Corporation ("Continental"), a Delaware corporation principally conducting business in Illinois and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"), sought to open a deposit-taking "nonbank" subsidiary, governed by § 4(c)(8) of the BHC Act, 12 U.S.C. § 1843 (c)(8), in Florida by obtaining a Florida Industrial Savings Bank ("ISB") charter (7a-8a).[2] Florida declined to issue such a charter by reason of a statutory prohibition of out-of-state ownership of ISBs (8a). When that prohibition was held invalid by the district court, Florida amended Florida Statutes § 664.02, so as to prohibit the issuance of new ISB charters to anyone (9a).[3] The court of appeals

[2] Citations in the form "—a" are to the opinions of the court of appeals as printed in the appendix to the jurisdictional statement. "JS" citations are to the jurisdictional statement itself. The brief submitted by the United States on jurisdiction is cited "U.S. Br." Appellant's brief on the merits is cited "Fla. Br.", and the brief on the merits of *amici curiae* supporting appellant is cited "Amici Br."

[3] Florida has abandoned its defense of the earlier-enacted provisions prohibiting out-of-state ownership of ISBs (JS 7) and now relies solely on § 664.02 as justification for its action.

found § 664.02, as amended, invalid under the Commerce Clause because both its stated purpose and its practical effect are to prevent competition in Florida by financial institutions owned by bank holding companies located outside the Southeast (16a-24a).[4]

The Federal Reserve Board had earlier reached the same conclusion with respect to Florida's supposedly "nondiscriminatory" ban on FDIC-insured nonbank subsidiaries of all bank holding companies. *Chemical New York Corp.*, 73 F.R.B. 609, 610-11, 612-16 (1987) ("*Chemical*"). The Board approved Chemical's application to expand the activities of a Florida-based subsidiary so as to include the acceptance of insured deposits and the making of consumer loans, holding that the facial neutrality of the statute was not determinative given that its practical effect was only upon non-Southeast holding companies. Florida's appeal is now pending in the court of appeals (Fla. Br. 32 n.79).

2. The court of appeals also rejected Florida's contention that Congress has consented to its otherwise unconstitutional discrimination. In so holding, the court followed this Court's ruling in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*Lewis I*"), that Congress's grant of authority to the States in the Douglas Amendment, § 3(d) of the BHC Act, 12 U.S.C. § 1842(d), with respect to ownership of "banks" by out-of-state bank holding companies did not extend to § 4(c)(8) nonbank subsidiaries (17a-20a). Again, the same result was reached by the Federal Reserve Board in *Chemical*, 73 F.R.B. at 616.

3. The court of appeals further rejected Florida's claim that § 101(a) of the Competitive Equality Banking Act,

[4] Florida has adopted limited interstate banking, providing reciprocal legal rights to bank holding companies "principally located," in terms of headquarters and situs of deposits, within specified Southeastern states. FLA. STAT. § 658.295. See Fla. Br. 12 n.23.

Pub. L. No. 100-96, 101 Stat. 554-57 (1987), mooted this action by broadening the BHC Act definition of "bank" to include all institutions whose deposits are FDIC-insured, as Continental's charter application contemplated that its ISB's deposits would be (32a-34a). Finally, the court of appeals remanded to the district court Continental's application for an award of attorneys' fees pursuant to 42 U.S.C. § 1988 or the "court's inherent power" (28a-30a, 34a-36a).

This brief presents argument only with respect to the Commerce Clause issues (Question 2 of the Questions Presented in Appellant's Brief). We take no position with respect to the attorneys' fees issue. As to mootness, we note that Continental can amend its existing application, which Florida rejected "without ruling on the merits" (Fla. Br. 5) by "refusing to process it" (8a), or can file a new application, so as to eliminate the FDIC insurance feature, thereby confining its request to do business to nonbank activities within the present BHC Act provisions.

Summary of Argument

The statute Florida seeks to sustain has both the purpose and effect of interdicting competition by bank holding companies located outside the Southeast. Congress has expressly permitted the ownership by bank holding companies of nonbank subsidiaries meeting certain criteria and has not authorized the States to prohibit competition by such subsidiaries within their respective borders. The fact that Florida's current legislative means to its protectionist end is a ban on the issuance of corporate charters for such subsidiaries, rather than one of the many other means it has employed over the years until each has been held unconstitutional, is of no decisional significance. Florida's

legislative act is void under the Commerce Clause as consistently construed by this Court for decades.

ARGUMENT

Florida's Prohibition on Local Competition for Deposits by Out-of-Region Bank Holding Companies Violates the Commerce Clause.

Both Florida, implicitly, and its supporting *amici*, explicitly, acknowledge that a state statute "that has a protectionist purpose or effect 'is virtually *per se* invalid under the Commerce Clause' " (Amici Br. 15, quoting *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 579 (1986)). They both also pay lip service to this Court's holding in *Lewis I* that the Douglas Amendment does not validate state prohibitions of nonbank subsidiaries of out-of-state bank holding companies (Fla. Br. 4; Amici Br. 21). But both then seek to justify Florida's adoption of just such a prohibition. None of the arguments they advance bears scrutiny.

A. Florida contends that it has "plenary authority" over its own chartering of corporations, seeming to imply that such authority is unreviewable (Fla. Br. 19-22); it then appears to acknowledge that such authority must be exercised in an "evenhanded" fashion vis-a-vis out-of-state firms (Fla. Br. 22-24). None of the charter cases cited by Florida (*id.* 19-22) bears the slightest resemblance to this case or holds that chartering statutes are immune from scrutiny under the Constitution. Indeed, as the United States noted in its brief prior to the Court's taking plenary jurisdiction, in *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69 (1987), upon which Florida and the *amici* place particular reliance, the Court carefully tested the

statute there in issue under the Commerce and Supremacy Clauses, *id.* at 84-87, 89-93, and the evenhanded regulation of internal corporate affairs the Court there upheld has no parallel here (see U.S. Br. 17), where the mechanics of corporate governance are not even in issue.[5]

Florida has no public policy against the conduct of business in general, or of financial services business in particular, through the corporate form. Florida has no public policy against the conduct of business by holding companies, in the financial services field or otherwise. What Florida has and has had for nearly two decades (2a-10a) is an adamant policy against competition by out-of-state (now out-of-region) bank holding companies from offices of non-bank subsidiaries located in Florida. This single-minded policy Florida has pursued by every legislative means available to the point where its official conduct may reasonably be termed contempt of the Constitution: as the court of appeals noted, the month following this Court's decision in *Lewis I*, the Florida legislature passed a whole new set of provisions interdicting out-of-state competition including

[5] The United States suggested in the first sentence of the only full paragraph on page 17 of its brief that "the effect of the court of appeals' invalidation of the Florida ISB ban is to require Florida to retain the ISB as a form of state-created financial institution for the foreseeable future," but then stated in the penultimate sentence of the paragraph that "the court of appeals' ruling does not require perpetual retention of the ISB form . . . ." It is not clear what substantive issue for resolution here or elsewhere is alluded to by these contradictory statements.

This Court does not sit to fine-tune the forms of the countless equitable decrees issued by the lower federal courts. Moreover, in the unlikely event that Florida ever has a *genuine* "nonprotectionist purpose" for "abolishing the ISB form" (see U.S. Br. 17), it is open to Florida to seek modification of the decree entered below in accordance with the equitable principles governing such applications. One thing that should be clear from Florida's historic pattern of enactments in this field is that it is entirely equitable for Florida to have that burden.

one which was, "in all pertinent ways, identical" to the provision just invalidated by this Court (5a-7a). *Compare Cooper* v. *Aaron*, 358 U.S. 1 (1958) (opinion by every member of the Court).

B. The court of appeals' conclusion (17a) that "the avowed purpose of this statute is to protect Florida banks from competition by financial institutions owned by out-of-state holding companies" is beyond dispute. The legislative history quoted in the court's opinion says so: "an ISB charter is seen as an effective way for out-of-state bank holding companies to gain access to Florida deposits. Accordingly, . . . the bill prohibits the issuance of any new industrial savings bank charters . . ." (17a, quoting COMMERCE COMM., FLORIDA HOUSE OF REPRESENTATIVES, FINAL STAFF SUMMARY OF HB 801, at 2-3 (May 31, 1984)). Given this specific acknowledgement and the notorious and persistent efforts of Florida to achieve its protectionist end, there is no basis whatever for claiming the statute to be benign in concept. Under the *per se* test established by this Court's decisions and acknowledged by the *amici*, no further inquiry is required.

It is equally clear, moreover, that the statute has the effect Florida intended. In-region holding companies have no need of § 4(c)(8) subsidiaries to compete in Florida; such subsidiaries are required only by out-of-region holding companies.[6] Florida's pretence (Fla. Br. 24), endorsed by the *amici* (Amici Br. 18, 19), that this unequal effect

[6] The efficacy of competition through an ISB unable to offer FDIC deposit insurance (Amici Br. 17; see Fla. Br. 15-16) is determinable only by the market; certainly, there is no basis to conclude that such an opportunity is inconsequential in light of the chance to do business by mail or to acquire a failed Florida bank (Fla. Br. 35). Indeed, were that so, Florida could truly moot this case, without sacrificing its protectionist policy, by repealing the offending amendment to § 664.02.

is caused exclusively by federal law is patent sophistry. Yes, Congress has limited interstate operations of holding company bank subsidiaries by the Douglas Amendment, but Congress has also provided for holding company ownership of nonbank subsidiaries without geographic limitation. It is Florida, and Florida alone, that has sought to deny effect to that aspect of the BHC Act in Florida, just as the Federal Reserve Board held it had done in *Chemical*, where the Board carefully considered the "interplay" between Florida law and the BHC Act, which the Board administers, and rejected Florida's "federal cause" argument. 73 F.R.B. at 614.

C. The contention (Fla. Br. 28-33; Amici Br. 19-22) that both the purpose and effect of § 664.02 are to prevent circumvention of the Douglas Amendment and to give further effect to Congressional policy, and even that the statute is actually authorized by the BHC Act, is precisely the argument advanced by Florida and its supporting *amici* in *Lewis I* and there rejected by the Court. Congress knows how to legislate, and Congress has precisely drafted and repeatedly revised the definition of "bank" in the BHC Act, thereby conclusively fixing the line separating bank subsidiaries and nonbank subsidiaries of holding companies. Florida has no power to amend the BHC Act so as "better" to effectuate that one of the Act's many purposes that Florida holds in highest regard.

D. Florida's reliance (Fla. Br. 24, 26-27), again echoed by the *amici* (Amici Br. 18), on *Exxon Corp.* v. *Maryland*, 437 U.S. 117 (1978), is as misplaced here as it was in *Lewis I*. Maryland legislated against integrated firms, not out-of-state firms, and had no evident discriminatory purpose. As noted by the Federal Reserve Board in *Chemical*, 73 F.R.B. at 615-16, Florida's posture is the

converse—it has no objection to integrated firms, its only policy is to prevent competition by out-of-region firms.[7] Nor, as noted above, does the *CTS* decision have any bearing here; there it was mere coincidence that the effect of an evenhanded regulation of a particular kind of commercial transaction was likely to fall on a greater number of out-of-state firms than local firms and no discriminatory objective was present. Here, again, the converse is true: the purpose is discrimination and it is no coincidence that the effect has been achieved.

E. The United States, in its brief submitted at the jurisdictional stage, recognized that § 664.02 had a "plainly . . . protectionist purpose"; that, because out-of-region bank holding companies "have no alternative means of gaining access" to the market for Florida deposits, the statute's "practical effect" is also "concededly discriminatory"; and that the "protectionist aim of the statute . . . is not federally authorized" by the Douglas Amendment and "is not a legitimate local purpose" (U.S. Br. 13-15). The Government nonetheless suggested the Court might wish to address the court of appeals' determination to evaluate the Florida ban on ISBs in terms of its "real-market" effect rather than its effect on ISBs alone (U.S. Br. 16-17). It is unclear what the point of this suggestion was: neither party to the action, nor anyone else, has ever suggested that the Constitution is addressed to "artificial," as opposed to "real," commerce or that ISBs alone constitute a "market"

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[7] The Second Circuit's decision in *Sears, Roebuck & Co.* v. *Brown*, 806 F.2d 399 (2d Cir. 1986), also relied upon by Florida (Fla. Br. 31-33), was based on a finding of no discriminatory purpose and limited disproportionate effect. To the extent the opinion is susceptible of a broader reading, its reliance on *Exxon* was misplaced, as is indicated by the Federal Reserve Board's subsequent analysis in *Chemical*.

of any kind. A conclusion that ISBs are in fact a "market" of constitutional consequence would reduce analysis in subsequent Commerce Clause cases to semantics.[8]

[8] Both the Florida legislature in enacting § 664.02 and Congress in enacting the Depository Institution Management Interlocks Act ("DIMIA"), 12 U.S.C. §§ 3201-3207, recognized that "nonbanks" such as ISBs compete with "banks" for deposits. Indeed, the House Report on the DIMIA stated that "[e]xisting law dealing with interlocking directorships among financial institutions is outdated" because its "proscriptions apply only to banks and are tied to an outmoded concept of market area." H.R. REP. NO. 1383, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273, 9286. The court of appeals' use of a "real-market" analysis coinciding with that adopted by Congress in regulating commerce and recognized by Florida as the whole predicate for its "plainly . . . protectionist purpose" (U.S. Br. 13) hardly presents an issue "so substantial as to require plenary consideration" by the Court, *see* Rule 15.1(h) of the Rules of this Court, much less legal error.

Conclusion

Florida's persistent defiance of the Constitution's creation of an economic as well as political Union must be brought to an end. For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 87-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERALD A. LEWIS, in his official capacities as Comptroller of the State of Florida, and Head of the Department of Banking and Finance of the State of Florida,

Appellant,

vs.

CONTINENTAL BANK CORPORATION, and WILLIAM D. PLECHATY, RICHARD H. HANNEMAN, JAMES P. JOHNSON, GAIL M. MELICK, and ROBERT J. FIDDES, as Applicants and Proposed Organizers of Continental Illinois Savings Bank of Dade County,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

RESPONSE OF APPELLEES CONTINENTAL BANK CORPORATION, ET AL. TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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PREFACE

This brief is submitted by appellees (collectively referred to as "Continental") in response to the portion of the *amicus curiae* brief of the United States ("U.S. Br.") which suggests that the court of appeals' decision be vacated and dismissed as moot because Continental "apparently" does not have plans to propose an industrial savings bank ("ISB") without insurance from the Federal Deposit Insurance Corporation ("FDIC"). (U.S. Br. 7). This brief is being submitted at this time due to the apparent suggestion of the Solicitor General that this Court should vacate the court of appeals' decision without any further briefing on the merits. (U.S. Br. 11). As is set forth below, the perceptions of the Solicitor General regarding the intentions of Continental are not accurate. The Solicitor General also appears to be unaware of the status of the related state court administrative proceeding. The *amicus* brief consequently misapprehends the status of Continental's application and the status of this appeal.

ARGUMENT

The Solicitor General suggests that this appeal be vacated as moot because Continental "apparently has . . . no plans" to pursue an ISB application without FDIC insurance. (U.S. Br. 7). The absence of such plans is alleged to be shown by the fact that "[s]ince the enactment of the 1987 amendments, Continental has not amended its application or filed a new application." (U.S. Br. 10). The Solicitor General continues by suggesting that "[i]f the Court is satisfied that Continental has had a sufficient opportunity to express . . . an intention" to amend or file a new application, this appeal should be dismissed as moot. (U.S. Br. 11).

The Solicitor General obviously is unaware of the present status of Continental's application proceeding before

the Florida Division of Administrative Hearings, Case No. 82-416. This proceeding was initially abated in 1982 on motion by the appellant Gerald Lewis, as Comptroller of the State of Florida and Head of the Department of Banking and Finance (the "Department") pending entry of a final order by the district court below. The terms of this stay were expanded in an order dated October 18, 1985, "pending resolution of the pending federal litigation." This order was entered without objection from the Department. These orders occurred years prior to the Competitive Equality Banking Act of 1987 ("CEBA") amendments to the Bank Holding Company Act. *See* Pub. L. No. 100-86, Section 101(a), 101 Stat., 554-557. Because of the stay, Continental had no legal means by which it could amend its application for an ISB. Continental's inaction in the state administrative proceeding thus has occurred for reasons which are unrelated to CEBA and are irrelevant to the existence of a justiciable controversy before this Court.

Under the Department's administrative practice, a licensure applicant generally is permitted to either continue or stay its application proceeding pending an appeal based on its perception of its best economic interest. *See First National Bank of Miramar v. Lewis*, 355 So. 2d 869 (Fla. 1st DCA 1978). In this case, Continental has endured eight years of litigation over the constitutionality of a statute reenacted virtually verbatim after it was unanimously condemned by this Court. (U.S. Br. 3). Continental's initial success in obtaining a preliminary injunction triggered the enactment of a second unconstitutional statute. (Mot. to Aff. 7-8). An illegal administrative policy was adopted by the Department after the trial court entered summary judgment and a third unconstitutional statutory amendment was enacted after the trial court's rejection of this administrative

policy. (Mot. to Aff. 8). For understandable economic reasons, Continental does not intend to reopen the state administrative proceedings unless and until this litigation is resolved in its favor. Continental estimates that the direct costs required for the preparation of an amended application will approximate $25,000.00 to $50,000.00. There is no reason to incur these costs until the outcome of this litigation is known.

In these circumstances, the claim that this case is moot because Continental has "carefully avoided" making any representation regarding its plans to propose an ISB without FDIC insurance (U.S. Br. 10) is simply unfounded. To carefully avoid any further uncertainty, however, Continental represents that it intends to propose the creation of a Florida ISB subsidiary upon the successful conclusion of this litigation. This representation is subject to the common sense qualification that conditions at that time warrant such proposals.

Finally, this appeal would not be moot even if Continental decided to abandon the particular application at issue here. The declaratory relief entered below "leaves [Continental] free to establish additional offices that § 659.141(1) [now recodified at Section 658.29(1)] would otherwise prohibit." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 n. 5 (1980). Continental and every other out-of-state bank holding company should be permitted to evaluate their business opportunities in Florida without the continued burden of unconstitutional barriers to interstate commerce. This appeal therefore is not moot.

CONCLUSION

For the reasons stated above, Continental accordingly respectfully submits that this Court should not vacate the decision of the court of appeals on the grounds of mootness and instead should reach the merits of Continental's pending motion to dismiss or affirm this appeal.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALD A. LEWIS, APPELLANT

v.

CONTINENTAL BANK CORPORATION, ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE

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QUESTION PRESENTED

The amicus curiae will address the following question:

Whether a claim that state action discriminates against interstate commerce in violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983, with the result that a party who prevails on such a claim is entitled to an award of attorneys' fees under 42 U.S.C. § 1988.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-1955

GERALD A. LEWIS, APPELLANT

v.

CONTINENTAL BANK CORPORATION, ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA and its members frequently invoke 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, *e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc.* v. *Suthard*, 681 F. Supp. 334 (E.D. Va. 1988); *Commonwealth of Kentucky Transp. Cabinet* v. *American Trucking Associations,*

Inc., 746 S.W.2d 65 (Ky. 1988). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983, and the concomitant entitlement to attorneys' fees under 42 U.S.C. § 1988, extend to violations of that right conferred by the Constitution.[1]

STATEMENT

In June 1981, Continental Illinois Corporation filed an application with appellant Lewis, who is both the Comptroller of the State of Florida and Head of the Florida Department of Banking and Finance, seeking to establish an industrial savings bank in Miami, Florida. Lewis denied the application on the authority of Florida statutes that barred an out-of-state bank holding company from obtaining control over a Florida industrial savings bank. Continental then commenced this action challenging the constitutionality of the Florida statutes on the ground that they discriminated against interstate commerce in violation of the Commerce Clause. The complaint included a cause of action under 42 U.S.C. § 1983 alleging that the Florida statutes deprived Continental of rights secured by the Commerce Clause. J.A. 9.

The district court held the Florida statutes unconstitutional; it further concluded that the case was not rendered moot by a new statute enacted by the Florida legislature after the court had issued its decision. Continental moved the district court for an award of attorneys' fees, arguing that it had prevailed on its claim under 42 U.S.C. § 1983 and therefore was entitled to attorneys' fees under 42 U.S.C.

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

§ 1988. Continental also suggested that fees could be awarded under Fed. R. Civ. P. 11, 28 U.S.C. § 1927, or the district court's inherent authority on the ground that Lewis had litigated in bad faith. The district court denied the motion without explanation.

The court of appeals upheld the district court's decision on the merits and concluded that the subsequently-enacted Florida statute also impermissibly discriminated against interstate commerce. The court of appeals remanded the attorneys' fee issue to the district court, directing that court to explain its denial of Continental's motion. J.S. App. 1a-30a.

Lewis filed a petition for rehearing with the court of appeals, arguing that a federal statute enacted while the case was pending before that court rendered Continental's claim moot. Continental filed a motion for attorneys' fees, contending that it was entitled to an award for fees incurred in the course of the appeal. Continental relied upon the same legal authority that it had cited in the attorneys' fee motion filed in the district court. The court of appeals denied Lewis' petition for rehearing and at the same time granted Continental's motion for an award of attorneys' fees incurred in the course of the appeal. J.S. App. 32a-36a.[2]

SUMMARY OF ARGUMENT

The language of 42 U.S.C. § 1983 is exceedingly broad. The statute provides a remedy whenever state action deprives a person of "*any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis added). That expansive language plainly

[2] The court of appeals directed the district court to determine the amount of fees to be awarded.

encompasses claims grounded in violations of the Commerce Clause. State action that transgresses the Clause's limitations upon state power deprives persons of their right to be free of burdensome or discriminatory state regulation not authorized by Congress.

Nothing in Section 1983's legislative history points toward a different conclusion. The absence of any words of limitation in the text of the statute places a heavy burden on a party arguing that the reach of the statute should be narrowed. Lewis cannot carry that burden here. Indeed, the consistent theme of the legislative debate was that Congress intended to safeguard *all* of the rights conferred by the Constitution by creating a remedy that encompassed violations of those rights. The legislative history thus confirms that the statute should be interpreted in accordance with its plain language.

Faced with this broad language and evidence of expansive congressional intent, Lewis and his amici contend that even if Congress did not intend to exclude Commerce Clause claims, those claims nonetheless fall outside the scope of Section 1983 because the Commerce Clause does not secure "rights" within the meaning of that statute. The argument is somewhat puzzling. No one contends that the Clause's limitations upon state authority are merely precatory or advisory; all agree that the Clause establishes binding restrictions that may be enforced in actions seeking injunctive or declaratory relief. The contention appears to be that the Commerce Clause confers a "second-class" right, sufficiently concrete to be enforced in some kinds of judicial actions, but not concrete enough to be cognizable under Section 1983.

Lewis and his amici attempt to justify this distinction by characterizing the Commerce Clause as a

structural provision of the Constitution that allocates regulatory authority between the federal government and the states, but does not protect individual rights. Any benefits reaped by individuals as a result of the Clause's operation are simply "incidental."

The flaw in this argument is the rather simplistic assumption that provisions of the Constitution may easily be divided into two separate groups, those that serve structural ends and those that protect individuals. Just as some constitutional provisions that may be viewed principally as conferring individual rights, such as the First Amendment, have structural aspects as well, provisions traditionally viewed as structural also confer important benefits on individuals. In fact, the Framers intended the Constitution's structural provisions to be the principal source of protection for individual rights. Dividing authority between the states and the federal government (and dividing federal authority among three separate branches) would "diffuse[] power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The Commerce Clause thus serves structural ends, allocating regulatory authority between the states and the federal government, and protects personal rights as well, both indirectly—by diffusing authority—and directly—by freeing all individuals from discriminatory or burdensome state regulation not authorized by Congress. This Court has recognized as much in its opinions, frequently adverting to the "right" to engage in interstate commerce. And the historical record indicates that one of the Framers' goals was to protect individuals from unfair regulation by the states.

The rights conferred by the Commerce Clause affect the liberty of American citizens to transact business on a national scale, free of burdens imposed by local legislatures that may be beholden to narrow, parochial interests. These rights are fundamental to the national citizenship the Constitution was established to secure. They are protected by Section 1983.

ARGUMENT

SECTION 1983 ENCOMPASSES CLAIMS SEEKING REDRESS FOR VIOLATIONS OF THE COMMERCE CLAUSE

This case presents several questions for decision by this Court. Our submission is limited to the third question presented in the jurisdictional statement: whether the court of appeals' award of attorneys' fees may be justified under 42 U.S.C. § 1988. The Court should conclude that the attorneys' fee award was authorized by Section 1988, because Commerce Clause claims are cognizable under 42 U.S.C. § 1983.

A. The Statutory Language And Legislative History Establish That Section 1983 Extends To Commerce Clause Claims.

The starting point for all questions of statutory interpretation is the language of the statute. The language of Section 1983 makes clear that the provision encompasses claims grounded in the Commerce Clause. The statute's legislative history confirms that conclusion, establishing that Congress created a broad remedy for violations of all rights conferred by the Constitution.

1. Section 1983 provides a remedy when a person acting under color of state law deprives the plaintiff of "*any* rights, privileges, or immunities secured

by the Constitution and laws" (emphasis added). The term "any" generally means a thing "selected without restriction or limitation of choice"; when used as a modifier as in Section 1983 "any" indicates "the maximum or whole of a number or quantity." *Webster's Third New International Dictionary* 97 (1986). Congress's choice of words establishes that this remedial statute has the widest possible compass. "It is difficult to imagine broader language." *United States* v. *James*, 478 U.S. 597, 604 (1986).

Indeed, the attempts by Lewis and his supporting amici to show that Congress wrote narrowly when it drafted Section 1983 serve only to confirm the breadth of the provision: these parties are unable to devise more expansive language. Thus, there is no meaningful difference in scope between the formulation suggested by Lewis (Br. 44)—"any claim or entitlement"—and the statute's reference to "any rights, privileges, or immunities."[3] Amici National Conference of State Legislatures, et al. (NCSL), compare Section 1983 to the Declaratory Judgment Act, 28 U.S.C. § 2201 (Br. 24); again, the latter statute's terminology—"rights and other legal relations"—is no more inclusive than the words that Congress selected for Section 1983.

Any doubt about the very broad scope of Section 1983 may be put to rest by comparing it to another provision of federal law whose breadth cannot be

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[3] Lewis' complaint (Br. 44 n.110) about the absence of the term "powers" from the statute makes no sense. The Commerce Clause plainly does not grant a "power" to Continental, and Continental therefore could not sue for the deprivation of a "power."

doubted—the statute governing this Court's jurisdiction to review state court judgments that rest on federal law. As it stood at the time Section 1983 was enacted, that statute authorized review by this Court in three categories of cases, one of which was those cases in which "any title, right, privilege, or immunity [had been] claimed under the constitution," a federal law, or a treaty, and the decision was against the federal right. See Judiciary Act of 1789, 1 Stat. 73, 85, as amended by the Act of Feb. 5, 1867, 14 Stat. 385, 386. The language delineating this category, which has been retained in the present-day statute (see 28 U.S.C. § 1257), closely resembles Section 1983's reference to "rights, privileges, or immunities secured by the Constitution." This part of the jurisdictional statute has long been recognized as exceedingly broad, permitting the Court to review decisions with respect to any conceivable constitutional claim. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 115 (6th ed. 1986) ("[t]his category constitutes by far the most frequently exercised segment of the Supreme Court's appellate jurisdiction over proceedings in state courts"). The parallel language of Section 1983 should therefore be interpreted to provide a remedy for the violation of all rights conferred by the Constitution.

Indeed, this Court already has concluded that this phrase "must be given the meaning and sweep that * * * [its] language dictate[s]"; the remedy extends to rights secured by "*all* of the Constitution and laws of the United States." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States* v. *Price*, 383 U.S. 787, 797 (1966)). See also *Monell* v. *Dep't of Social Services*, 436 U.S. 658, 700 (1978)

("there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 663 (1979) (White, J., concurring) (Section 1983 "protect[s] against state invasion of *any* and *all* constitutional rights") (emphasis in original).[4] The language of the statute, the clearest guide for ascertaining Congress's intent, thus establishes that Congress intended to encompass all claims alleging violations of rights secured by the Constitution—including those grounded in the Commerce Clause—within the scope of Section 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980) (refusing to limit Section 1983's plain language).

2. The breadth and clarity of the text of Section 1983 eliminate any need to consult the provision's legislative history. See *Davis* v. *Michigan Dep't of Treasury*, 109 S.Ct. 1500, 1504 n.3 (1989) ("[l]egislative history is irrelevant to the interpretation of an unambiguous statute"); *United States* v. *Ron Pair Enterprises*, 109 S.Ct. 1026, 1030 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according

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[4] NCSL suggests that the Court's conclusion in *Lynch* has been eroded by the subsequent determination that some federal statutes do not create enforceable rights. Br. 26 n.18, citing *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981). But the two decisions do not conflict. The requirement that a federal statute—or a part of the Constitution—create an enforceable right in order to provide the basis for an action under Section 1983 does not at all undercut the conclusion that *all* provisions of the Constitution that do create enforceable rights are encompassed within Section 1983. See pages 16-19, *infra*.

to its terms' "); *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). In any event, the legislative history simply confirms that Congress meant what it said when it enacted Section 1983.

There was no suggestion when Section 1983 was enacted that some constitutional rights were to be excluded from the statutory remedy. Rather, the consistent theme of the legislative debate is that Congress intended to create a general remedy for violations of rights secured by the Constitution. One Congressman stated:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. *They are not defined in it, and there is no attempt in it to put limitations upon any of them*; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities.

Cong. Globe, 42d Cong., 1st Sess. 475 (1871) (Rep. Dawes) (emphasis added). See also *id.* at App. 68 (Rep. Shellabarger); *id.* at App. 81 (Rep. Bingham); *Monell*, 436 U.S. at 683-686 (summarizing legislative history). Most significantly, nothing in the legislative history indicates that Congress intended to treat rights conferred by the Commerce Clause any differently than those granted by other provisions of the Constitution.

Lewis and his supporting amici argue that the legislative history establishes that Congress intended to limit the remedy provided by Section 1983 to a narrow class of constitutional rights. Thus, Lewis contends that Section 1983 is restricted to "rights secured by the Civil War amendments to the Constitution." Br. 43 (footnote omitted). And NCSL seeks (Br. 24-25) to limit Section 1983 to the guarantees set forth in the Bill of Rights and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. While there is no doubt that Congress's immediate focus was on the southern states' failure to protect the newly-freed slaves against racially-based violence instigated by the Ku Klux Klan, there is no evidence that Congress intended to restrict the Section 1983 remedy to state action implicating the equal protection guarantee.

NCSL rests its limited view of Section 1983 on its contention (Br. 24-25) that in describing the rights protected by Section 1983, legislators referred only to the protections set forth in the Bill of Rights and the Equal Protection and Due Process Clauses. That characterization of the congressional debate simply is not correct. The first legislator whose comments are cited by NCSL, Representative Dawes, observed that the Constitution adopted in 1789 (which, of course, did not include any of the provisions selected by NCSL) secured rights, privileges, and immunities "so peculiar that [the American citizen] stood before the world a wonder and a marvel among all the nations of the earth." Cong. Globe, 42d Cong., 1st Sess. 475 (1871). He stated that "when, *in addition to those privileges and immunities thus secured to him*," one added the protections secured by the amendments to the Constitution, he could "hardly comprehend[] the full scope and measure of the phrase which appears in this bill." *Ibid.* (emphasis added). These comments make clear that the

statute extended to both sets of constitutional protections. Other legislators also referred to provisions of the original Constitution in describing the scope of the statute. *Id.* at 486 (Rep. Cook) (discussing the Contracts Clause). And, as we have discussed, a number of Congressmen referred to all of the rights conferred by the Constitution.

Of course, NCSL could not prevail even if the debates did focus almost exclusively on the provisions of the Fourteenth Amendment. That fact would not "create a 'negative inference' limiting the scope of [Section 1983] to the specific problem that motivated its enactment." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983); see also *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 371 (1986); *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 867 (1983). Congress's choice of general language establishes that it intended to give the statute a wider compass.[5]

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[5] Lewis observes that the Act that contained Section 1983 was entitled "An Act to enforce the Provisions of the Fourteenth Amendment . . ." (Br. 43), omitting the fact that the full title is "An Act to enforce the Provisions of the Fourteenth Amendment the Constitution of the United States *and for other purposes*" (emphasis added). The title is thus fully consistent with a broad interpretation of Section 1983. See also *Strathearn Steamship Co.* v. *Dillon*, 252 U.S. 348, 354 (1920) (title of a statute cannot justify a construction of a statute contrary to its unambiguous terms); *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386-387 (1805) (same).

Lewis also argues (Br. 44-45) that Congress's decision to endow the federal courts with general federal question jurisdiction in 1875 shows that Congress did not intend to write broadly when Section 1983 was enacted four years earlier. But the two statutes are completely different: Section 1983

Lewis (Br. 43 n. 109) and NCSL (Br. 25) advance one additional argument based on Section 1983's legislative history. They wrench from the congressional debate a single comment by Representative Shellabarger, one of the principal sponsors of the statute, arguing that because he drew a distinction between those provisions of the Constitution that "restrain and directly relate to the States" and those provisions that "relate directly to the rights of persons within the States," his statement establishes that Section 1983 provides a remedy only for violations of the latter category of constitutional provisions. Viewed in the context of the debate, however, it is clear that Representative Shellabarger was not describing a limitation upon the scope of Section 1983.

First, Representative Shellabarger was not even discussing the part of the 1871 statute that contained the predecessor of Section 1983. He had completed his discussion of that portion of the bill (see Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871)), which was contained in Section 1, and turned to Section 2, which made it a federal crime to engage in a conspiracy "to do any act in violation of the rights, privileges, or immunities of another person" that would constitute a federal crime in places under the exclusive jurisdiction of the United States. This provision differed from Section 1983 in that it was not limited to rights, privileges and immunities

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creates a cause of action; the 1875 statute merely confers jurisdiction to entertain causes of action created by other statutes or by the common law. Even after 1875, a plaintiff could not rely upon the jurisdictional statute alone, but rather would have had to invoke Section 1983 as well in order to establish the basis for his cause of action. See also *Lynch*, 405 U.S. at 546-549 (rejecting a similar argument).

secured by the Constitution; Representative Shellabarger explained that Section 2 was intended to reach beyond the rights recognized directly in the Constitution to protect the "fundamental rights" that "inhere in citizenship," apparently on the theory that these rights were protected by the Privileges and Immunities Clause. *Id.* at App. 69.

A principal objection to the provision was that Congress lacked the power to enact it, because it infringed upon the powers reserved to the states by overriding their authority to define and punish crimes. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 45 (1871) (Rep. Kerr). In responding to this argument, Representative Shellabarger contended that Congress had the power to enforce by legislation all provisions of the Constitution. *Id.* at App. 69 ("Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced"). Representative Shellabarger argued that the federal government had always assumed that it possessed the power to enforce the parts of the Constitution that did not expressly confer enforcement authority upon Congress. He recognized, in the passage relied upon by Lewis and NCSL, that "[m]ost of the provisions of the Constitution which restrain and directly relate to the States" had been enforced by the courts without federal legislation. *Id.* at 69; see also *id.* at 70 (absence of prior legislation reflected fact that it had been deemed unnecessary, not that Congress lacked the power to adopt it). But he noted that other constitutional provisions limiting state authority—the Extradition Clause, the Privileges and Immunities Clause, and the Fugitive Slave Clause—had been enforced by federal legislation. *Id.* at 69-70.

This affirmation of *broad* congressional power to create remedies for violations of constitutional rights provides no grounds for a *narrow* interpretation of Section 1983. Representative Shellabarger's comments had nothing to do with his view of the scope of Section 1983; they were an effort to show why the historical record supported his theory that Congress had the power to enforce the Constitution's limits on state authority. His statement that Congress in the past had found it unnecessary to enact statutory remedies for violations of *some* of these provisions does not provide any support for the view that the Congress that enacted Section 1983 intended to limit the scope of that new remedy. Indeed, to the extent the discussion is relevant at all, it reveals an expansive view of Congress's role in providing remedies for constitutional rights that supports a broad interpretation of Section 1983.

Even if this "fragment[] of legislative history" could be read to provide some support for a narrow interpretation of the statute, and we believe it does not, it plainly does not constitute "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982); see also *United States* v. *James*, 478 U.S. at 612. "[I]f Congress had intended to limit [the statute's] scope • • • it is not unreasonable to assume that it would have made this [limitation] explicit." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 550 (1978). When a party invokes legislative history to justify limiting statutory language that is "broad and unqualified," the legislative history must provide "substantial support

for limiting language that Congress itself chose not to limit." *Ibid.* (footnote omitted). The legislative history of Section 1983 falls far short of this standard and accordingly does not justify excluding Commerce Clause claims from the unqualified scope of the statute.[6]

B. The Commerce Clause Creates "Rights" Within The Meaning Of Section 1983.

Unable to find anything in the statute or its legislative history to justify excluding Commerce Clause claims from Section 1983, Lewis and his amici try to accomplish the same result by arguing that the Commerce Clause does not confer a "right" within the meaning of the statute. NCSL at one point suggests (Br. 24) that the appropriate standard is the one used by this Court to determine whether a federal statute creates "rights" enforceable under Section 1983. Not surprisingly, NCSL never actually follows its own suggestion; when that test is applied, it is clear that Commerce Clause claims are actionable under Section 1983.

1. The Court has held that a statute does not create rights within the meaning of Section 1983 when the statute "indicat[es] no more than a congressional preference—at most a 'nudge in the preferred directio[n],' * * * not * * * ris[ing] to the level of an enforceable right." *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479

[6] Lewis hints (Br. 43-44 n.109) that Congress might not have the power to create a remedy for violations of all constitutional rights. Whatever the merit of that suggestion in the abstract, it is clear that Congress's plenary power over interstate commerce provides ample authority for a remedy for violations of rights conferred by the Commerce Clause.

U.S. 418, 423 (1987) (citation omitted); compare *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 27 (1981) (statute did not create right cognizable under Section 1983 because it "impose[d] * * * [no] binding obligations on the states"). The Commerce Clause plainly creates enforceable rights; no one disputes that a plaintiff may obtain injunctive relief on the basis of a claim grounded in the Commerce Clause. See NCSL Br. 29.

NCSL recognizes (Br. 24) that a constitutional provision creates "rights" when it "serves the purpose of protecting [individuals] from government intrusion." That is a perfect description of the role of the Commerce Clause—it protects individuals against burdensome and discriminatory state regulation. Under NCSL's own test, therefore, Commerce Clause claims are cognizable under Section 1983.

Indeed, the question whether the Commerce Clause creates "rights" is not one of first impression. The Court's decision in *United States* v. *Guest*, 383 U.S. 745 (1966), provides strong support for the conclusion that the Commerce Clause confers rights cognizable under Section 1983. One question in that case was whether an indictment charging a conspiracy to deprive citizens of the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce" stated a violation of 18 U.S.C. § 241, which criminalizes conspiracies to intimidate the exercise of "any right or privilege secured * * * by the Constitution." Relying principally upon the Commerce Clause as the source of the constitutional right to travel, the Court upheld the indictment on the ground that it alleged a conspiracy to deprive citizens of a right secured by the Constitution. 383

U.S. at 757-759. *Guest* thus establishes that the Commerce Clause secures rights cognizable under Section 1983.

Lewis (Br. 45) and NCSL (Br. 26) rely upon *Carter* v. *Greenhow*, 114 U.S. 317 (1885), asserting that the Court there held that the Contracts Clause does not secure rights within the meaning of Section 1983. Even if this characterization of the decision were correct, *Carter* would shed little light upon whether Section 1983 encompasses claims under an entirely different provision of the Constitution. In fact, Lewis and NCSL have substantially overstated the holding of *Carter*.

The plaintiff in *Carter* sought to vindicate the contractual right, conferred by an 1879 state statute, to pay his state taxes with coupons from state bonds. The state refused to accept the coupons, relying on a subsequently-enacted statute that eliminated the payment right. This Court observed that "[t]he rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the [1879 statute] and the bonds and coupons issued under its authority." 114 U.S. at 322. Because the plaintiff framed the case in this manner, and the Contracts Clause came into play only in response to the State's argument that a subsequent statute altered the plaintiff's rights under the 1879 statute, the Court concluded that the plaintiff had not alleged the deprivation of a right secured by the Constitution. As Justice Stone observed, *Carter* "held *as a matter of pleading* that the particular cause of action set up in the plaintiff's

pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.' " *Hague* v. *CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.) (emphasis added); see also *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. at 613 n.29 (relying on Justice Stone's explanation of *Carter*).

Lewis also relies (Br. 46) upon *Bowman* v. *Chicago & Northwestern Ry.*, 115 U.S. 611 (1885). It is not even clear which provision of the Constitution was implicated in that case, because the Court's opinion is silent on that question. In any event, the decision rests on the same pleading technicality as *Carter*. Because the plaintiff alleged a violation of a right conferred by state law, and did not allege the deprivation of rights secured by the Constitution, he failed to state a claim under Section 1983. See *Chapman*, 441 U.S. at 658-659 n.27 (White, J., concurring in the judgment) (claims in *Carter* and *Bowman* were dismissed because the particular rights alleged to have been infringed were not secured by federal law).

2. Instead of looking to the Court's precedents to define the scope of Section 1983, Lewis and NCSL concoct an entirely new standard, contending that the Commerce Clause "protects the operation of interstate markets" but "does *not* guarantee the rights of individual participants in those markets." Lewis Br. 41 (emphasis in original); see also NCSL Br. 26-28 (Commerce Clause does not protect individual rights, but " 'further[s] the national interest in an efficient economy' " by allocating regulatory authority between the federal government and the states) (citation omitted).

The fundamental flaw in this argument is the assumption that each provision of the Constitution may be described in only one way or the other: as either creating rights or allocating authority in order to serve structural ends, but not both. In fact, of course, a single provision of the Constitution can serve both purposes at the same time. For example, the protection of the Free Speech Clause typically is viewed as conferring a personal right, but the right also is a structural one, securing robust political debate in order to promote the political well-being of the Nation.

The same is true of the Constitution's more explicitly structural provisions: "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The distribution of powers between the states and the federal government, and among the branches of the federal government, was designed in large part to protect against majoritarian tyranny. See *The Federalist* No. 51 (J. Madison), at 321 (Mentor ed. 1981); *The Federalist* No. 84 (A. Hamilton), at 515. This Court has recognized that the separation of powers doctrine protects individual rights. *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986); see also *Synar* v. *United States* 626 F. Supp. 1374, 1403 (D.D.C.), aff'd, 478 U.S. 714 (1986). The Commerce Clause's limitation upon state authority serves that purpose as well.

This Court recently rejected in another context the argument that "structural" constitutional principles do not give rise to individual rights. In *Davis* v. *Michigan Dep't of the Treasury*, 109 S.Ct. 1500 (1989), a case involving intergovernmental tax immunity, the State argued that an individual taxpayer

could not claim the protection of the immunity doctrine in seeking a tax refund because its purpose was "to protect governments and not private entities or individuals" (109 S.Ct. at 1507). The Court disagreed, holding that an individual could maintain such a claim: "It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary" (*ibid.* (citations omitted)).

The same conclusion applies here. The right of individuals under the Commerce Clause to participate in a national market free of discriminatory or burdensome state regulation is both a structural rule, allocating regulatory authority between the federal and state governments, and a personal right, freeing all individuals from discriminatory state regulation not authorized by Congress. While it is true, as Lewis and his amici observe, that the Court on occasion has characterized the Commerce Clause as a structural provision of the Constitution, the Court also has spoken in terms of an individual's "right" to engage in interstate commerce free of burdensome and discriminatory state regulation.

As early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice Marshall recognized a "right" of constitutional dimensions to engage in "intercourse between state and state." Over the years, this Court has had frequent occasion to reemphasize that the right "[t]o carry on interstate commerce is not a franchise or a privilege granted by

the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); see also *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) ("[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one"); *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 48 (1910); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

The dual character of the Commerce Clause is also supported by the historical record. While the Framers of the Constitution did refer to the need to prevent strife among the States as one justification for conferring the commerce power upon the federal government, they also sought to protect individuals. Hamilton commented that one of the adverse consequences of continued "interfering and unneighborly regulation[]" by the States would be that "the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." *The Federalist* No. 22, at 144-145 (Mentor ed. 1981); see also *The Federalist* No. 42 (J. Madison), at 268 (referring to the "unfair[ness]" of extraterritorial state regulation); 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (Commerce Clause prevented "injustice among the States themselves").

Thus, the Commerce Clause does not merely allocate power between the federal government and the states, but secures personal rights as well. These rights affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. Commerce Clause rights are fundamental to the national citizenship that the Constitution was established to secure. They surely are protected by Section 1983.[7]

3. Lewis and NCSL also contend that their interpretation of Section 1983 is justified on policy grounds. Of course, policy arguments, no matter how persuasive, cannot trump Congress's clear intent as expressed in the statute and its legislative history. See, *e.g.*, *Pinter* v. *Dahl*, 108 S.Ct. 2063, 2082 (1988); *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 108 S.Ct. 830, 837 (1988). In any event, there is no merit to these arguments.

Lewis asserts (Br. 49), for example, that a holding that Commerce Clause claims are cognizable under Section 1983 will "promote economic claims by business interests, a result wholly inconsistent with the § 1983's original purpose." This Court already has rejected the contention that Section 1983 protects "personal" rights and not property rights. As the Court remarked in *Lynch*, 405 U.S. at 552, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. * * * [A] fundamental interdependence exists between the personal right to lib-

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[7] NCSL hints (Br. 28) that the rights conferred by the Commerce Clause should be accorded lesser status because they may be overridden by congressional action. But the same is true of the rights secured by federal "laws," which indisputably can form the basis for an action under Section 1983. As with statutory rights, the fact that Congress may eliminate a previously-existing Commerce Clause right is irrelevant when Congress has not acted.

erty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." Under this Court's decision in *Maine* v. *Thiboutot*, *supra*, federal statutes, including statutes that confer economic benefits, create rights cognizable under Section 1983. It would be anomalous indeed if the class of constitutional provisions giving rise to Section 1983 claims were drawn more narrowly.

Similarly unsupportable is Lewis' claim (Br. 48) that business plaintiffs are somehow inappropriate recipients of attorneys' fee awards. Congress did not limit eligibility for fee awards under Section 1988 to individual plaintiffs and small businesses, as it has done with other fee-shifting statutes. See 28 U.S.C. § 2412(d)(2)(B). Indeed, business plaintiffs often recover damages and attorneys' fees under Section 1983 when they sue to enforce other constitutional rights, such as those conferred by the Due Process Clause and the First Amendment.[8]

Lewis also suggests (Br. 47-48) that the threat of monetary liability under Section 1983 will deter legitimate regulation. To begin with, it is not at all clear that the threat of monetary liability is so great. States are not subject to suit under Section 1983 (see *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989)), so the largest class of regulators—and

[8] Lewis asserts (Br. 48) that "any person conceivably affected by a state economic regulation" would be encouraged to file suit. But only prevailing parties are eligible for fee awards under Section 1988. Thus, a prospective plaintiff with little chance to prevail would be deterred by the substantial possibility that he would be forced to bear his own litigation costs. In addition, of course, persons bringing frivolous suits would be subject to sanctions under Fed. R. Civ. P. 11.

the group most likely to engage in regulation of interstate commerce—is exempt from damages liability. Moreover, most plaintiffs challenging state action under the Commerce Clause, like Continental in the present case, seek only declaratory and injunctive relief eliminating the unconstitutional regulation. And where retrospective relief is sought, a plaintiff would have to establish causation, prove its damages with the requisite degree of certainty, and overcome affirmative defenses such as the statute of limitations. See *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 306 (1986); *Carey* v. *Piphus*, 435 U.S. 247 (1978). These burdens serve to limit defendants' financial exposure under Section 1983.

Finally, the fact that a local governmental entity might be subject to monetary liability for erroneous "close calls" regarding the constitutionality of government regulation is not an inappropriate result. This Court concluded in *Owen* v. *City of Independence*, 445 U.S. 622, 655 (1980), that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." See also *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S 304 (1987). That basic principle, which applies to violations of constitutional rights generally, should extend to Commerce Clause claims as well.

CONCLUSION

If the Court reaches the attorneys' fee issue, it should hold that a party who proves a violation of the Commerce Clause is entitled to attorneys' fees under 42 U.S.C. § 1988, because Commerce Clause claims are cognizable under 42 U.S.C. § 1983.

Respectfully submitted.

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